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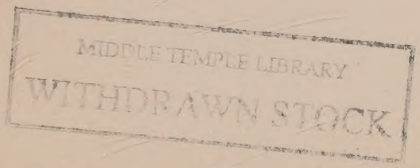
THE LAW OF DOMICILE

IN ITS

RELATION TO SUCCESSION

AND THE DOCTRINE OF RENVOI

(BEING THE YORKE PRIZE ESSAY FOR 1910)



BY

NORMAN BENTWICH

SOMETIME SCHOLAR OF TRINITY COLLEGE, CAMBRIDGE, AND OF LINCOLN'S INN, BARRISTER-AT-LAW

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"THE LAW OF PRIVATE PROPERTY IN WAR," AND "THE DECLARATION OF LONDON"

LONDON
SWEET AND MAXWELL, LIMITED
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1911

TO

ERNEST J. SCHUSTER, ESQ., LL.D.

A MASTER OF COMPARATIVE LAW

IN SINCERE RESPECT

FROM A TYRO

PREFACE

THIS book is founded on the Essay which was awarded the Yorke Prize at Cambridge University in 1910, and is published in accordance with the terms of the Prize. My endeavour has been to state as clearly and concisely as possible the positive law bearing upon the effect of domicile on succession, in such a way as to bring out and justify the principles underlying it; and when the principles seem to be infringed, to point out the defect and suggest the way of amendment. While emphasizing, however, the principles which are embodied in the law, I have had regard to the maxim that an ounce of practice is worth a pound of theory, and my primary authorities have been the reports of the English cases. As a guide to them I have used the text-books on Private International Law of Westlake, Dicey, Foote, Piggott, and Nelson. The writer to whom I feel under the greatest obligation is my old teacher, Dr. Westlake, whose concise statement of the rule I have occasionally adopted. I have ventured at times to criticize judicial decisions, and I have dwelt upon several points where there appears to me to be a lack of reciprocity in our practice.

Moreover, though primarily concerned with the English law as it is, I have dealt briefly with the history of Private International Law as to Succession and with the theory and practice of Continental countries. I am under obligation for this part of the subject to Weiss' *Traité théorique et pratique de Droit International Privé*, Gillespie's translation of Von Bar's *Das*

Internationale Privat-Recht, and Pillet's *Principes du Droit International Privé* among foreign works, and to Burge's Commentaries on Colonial and Foreign Laws (in the new edition by Mr. Justice Wood-Renton and Mr. Phillimore) and Story's Conflict of Laws among English works.

In dealing with the theory of the *Renvoi* I have had regard, in the first place, to the practice embodied in the decisions both English and foreign, and I have endeavoured to elucidate a certain rule from the cases. I have proceeded to deal with the theoretical arguments advanced for and against the doctrine. It is still a matter of great controversy, and I have taken a definite attitude myself in its favour.

I hope that this book, dealing as it does with that part of a large subject which, owing to the increasing communication between different countries, is constantly becoming of greater practical importance, will be of use, on the one hand, to students of private international law, for whom it may serve as an introduction to the bigger works on that science; and on the other hand, to those concerned in the administration of estates about which a question of domicile arises, who will find the English rules and the general principles bearing on the matter put together and examined.

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ADDENDA.

NOTE.—*In Re Mackenzie, Mackenzie* v. *Edwards-Moss* (pp. 34 and 135) is now reported in L. R. 1911, 1 Ch. 578.

ADDENDUM to p. 93 before "In Lord Kingsdown's Act," etc.

Where likewise the widow elects to take against the will of her husband, and enforces her legal rights in the manner of *jus relictae* and *terce* by the law of his domicile against his estate, she will be prevented from claiming under another will of the husband property which is situated in another country where those rights do not apply. Cf. *Douglas-Menzies* v. *Umphelby* (L. R. 1908, A. C. 224). In that case a testator domiciled in Scotland, having an estate in Great Britain and another in Australia, executed two testamentary instruments, one disposing of the British and the other of the Australian estate, and directed that the British estate should be administered by the law of Scotland, and the Australian estate by the law of New South Wales. The widow, on his death without issue, obtained a decree of the Court in Scotland establishing her legal right in the manner of *jus relictae* and *terce*, and then in the Australian Courts claimed the benefit of the dispositions in her favour contained in the Australian will. But the Privy Council held that the two instruments formed one will containing a coherent scheme of intention; and that the widow, having elected to defeat the will in part, could not claim under it and took no interest under the Australian instrument. By her election her rights were determined by the law of the husband's domicile.

ADDENDUM to p. 127 after "donee's domicile."

While this book was in the press, the Court of Appeal, reversing the judgment of Mr. Justice Parker, 104 L. T. 202, held that capacity to dispose by will of a fund subject to a general power of appointment is affected by the law of the donee's domicile (*In re Pryce, Lawford* v. *Pryce*, Law Journal Newspaper, June 10th, 1911, p. 370). There, a domiciled Dutch woman, having under an English will a general testamentary power of appointment, made a will in Dutch form, but so as to be well executed also by English law, whereby she appointed her husband heir of all which the law would allow her to dispose in his favour. By Dutch law she could not dispose of more than seven-eighths of her own estate in this way, the remaining portion belonging to her mother, and the Lords Justices held that the Dutch restriction prevailed, and that the mother of the testatrix was entitled. They adopted the view taken by the same Court in *Re Hadley* (1909, 1 Ch. 20), a case upon the incidence of Estate Duty on an appointed fund, that a person, exercising by will a general power of appointment, makes the fund his own assets in the first instance. As Farwell, L.J., said there (at p. 35)—"It is quite clear that . . . the appointees take from his bounty, and not from that of the creator of the power as is the case with limited powers." Upon this view the fund subject to a general power passes into the estate of the donee, and is subject to the law which governs the disposing capacity of that person, viz. the law of the domicile. The Court distinguished the cases of *Pouey* v. *Hordern* and *In re Bald* (see p. 126), where the capacity to dispose of a fund subject to a *special* power was in question, and *In re Mégret* where the power of appointment was given by a settlement, and the fund was therefore regarded as subject to the law of the settlement.

THE PRINCIPLE OF DOMICILE IN ITS RELATION TO SUCCESSION

CHAPTER I

HISTORICAL INTRODUCTION

WHILE the Roman Empire and the Roman Law comprehended the whole of civilization, there could be no question of conflicting jurisdictions; but so soon as the civilized world was divided up into a number of sovereign States, each with its territorial jurisdiction, and each possessing different laws, the question arose by what law the rights of a foreign resident in any country were to be determined. Was he still subject to the laws of the society in which he had his origin, or did he become by his change of residence subject to the laws which governed the society amid which he lived?

The question was from early in the Middle Ages discussed in the form: Is the sovereignty of law territorial or personal, or is it in truth both? And the answer to the question varied at different epochs of history. In the Western Roman Empire, which inherited the Roman law, the idea of the personal sovereignty of the law obtained, and a man's personal law was that of the *civitas* to which he belonged by hereditary origin. In the Dark Ages which followed the fall of the Empire, when states were formed of heterogeneous collections of Roman citizens and various semi-civilized nations, the idea of the personal law prevailed for a time still more completely. Each man, wherever he lived, was subject to the law of the particular ethnic

group to which he belonged, and all his proprietary rights were determined by that law. But gradually there grew up in the different towns and provinces certain fixed customs and rules affecting all property within the locality, which were known as "Statutes." In time, however, the connotation of "statute" was enlarged till it covered all law; but the distinction then grew up between "real statute" and "personal statute," based upon the famous division of private law according as it dealt with things or persons. The former were such as dealt primarily with property, and applied to strangers in the locality over which they extended; the latter were such as dealt primarily with persons, and followed them outside the place of their origin or fixed residence. There was, however, no clear or logical demarcation between real and personal statutes, and a third class of laws was formulated by the mediæval jurists, known as Mixed Statutes, which partook of both qualities; and endless controversy followed as to whether a particular rule was to be regarded as having the characteristics of a real or a personal or a mixed statute. But with the progress of feudal ideas, more especially in the countries north of the Alps, where they were completely established, the doctrine of a personal law was crushed out for a period, and the territorial conception of law prevailed exclusively.

The basis of feudal society was the attachment of sovereignty and of all civil rights to the soil. The stranger who had no landed property in a feudal society was in little better position than the outlaw, until by length of residence he was assigned some grade in the community; and then he became entirely subject to the territorial law. The customs which grew up in a fief became law, and were binding upon all persons resident within the feudal jurisdiction. As the principle was subsequently laid down, "*toutes les coutumes sont réelles;*" they were "exclusive within their territories, of no effect outside them" (*a*). Man was reduced to the humble *rôle* of accessory to the soil on which he fixed his habitation; and if he died leaving property

(*a*) Cf. Westlake, "Private International Law," p. 16.

in different territorial jurisdictions, the portion of the goods in each country was divided according to the custom which obtained there. The maxim applied to succession was, "*Quot sunt bona diversis territoriis obnoxia, totidem patrimonia intelliguntur.*" In practice, however, as Savigny pointed out, no part of a succession (moveable or immoveable) situated in the country ever fell to foreign heirs, but the whole devolved in their stead to the Sovereign. As late as the nineteenth century it was illegal for aliens to succeed to real estate in England; a devise to them was forfeited to the Crown. In earlier periods the personal property of aliens in the country had fallen also as *bona vacantia* to the Crown upon their decease.

The absolutely territorial character of the law was a very simple doctrine; but so soon as people began to travel or remove their residence for purposes of commerce, it gave rise to grave inconveniences, and modifications upon it were demanded, based upon the old Roman principle that law depends on personal subjection to it. During the fourteenth and fifteenth centuries, the doctors of the universities in the south of France and Italy discussed interminably the proper limits of the two principles of law. Bartolus at the beginning of this period, and Dumoulin and D'Argentré at the end of it, are the most distinguished jurists of the French school, which made the first halting steps towards a science of the conflict of laws. But these pioneers were concerned rather with determining the proper field of each law. The first clear conception of a science appears in the Jurists of the Low Countries (*i.e.* Holland and Belgium) at the beginning of the seventeenth century. The impulse which Grotius had given to the study of the *Jus Gentium*, and to the determination of the rules which should govern the conduct of sovereign states in their public relations to each other, heralds the revival of interest in the study of the rules which should govern the judges of the national courts in determining the law to be applied to the property of a foreign person, which fell within their jurisdiction.

Gradually the doctrine of the personal law gained ground. The extreme realistic standpoint which had hitherto prevailed is upheld by Nicholas de Bourgoigne (1586–1649), who maintained that a person is accessory to his property, not the property to the person. "*Bona homini sanguis et anima sunt, quae si non habet, tamquam mortuus inter vivos ambulat.*" And again: "*Bona personam non sequuntur, sed personas ipsas ad se trahunt.*" A little later, however, Paul Voet (1619–1677) advocated the difference of treatment between moveables and immoveables in cases of succession to a foreign testator: and applied to the former kind of property the notion of a personal law. "*Immobilia statutis loci ubi sita, mobilia loci statutis ubi testator habuit domicilium subjiciuntur*" (De Stat. s. 4, ch. 3). His son, John Voet (1647–1714), while still advocating the territorial character of law, admits that by a doctrine of "courtesy" the courts in some countries submit the moveable goods, whatever be their situation, to the law of the domicile of the proprietor. They accept the maxim "*Mobilia sequuntur personam*" as part of the *Jus Gentium*, and recognize a "*Comitas legum*," which mitigates the strict theory of the law.

A contemporary of the younger Voet, Ulric Huber (1636–1694), laid down in his treatise "*De Conflictu Legum*" three axioms, which summarise the principles adopted at this period for the resolution of conflicts between different systems of laws: (1) "The laws of every state prevail within its territory, and govern all its subjects, but have no force elsewhere. (2) All those who are found within its territory, whether with a permanent or temporary residence, are to be considered as subjects of the state. (3) The rulers of states admit by comity the laws of every people, after having been applied within their territory to preserve their effect everywhere, provided that neither other states nor their subjects receive thereby any injury to their power or to their rights." The third rule was applied in practice to regulate the capacity and status of a person by the law of his domicile, and in matters of succession to determine the distribution of his moveable property by the

same law. The feudal conception of law as strictly territorial remained supreme so far as concerned succession to all landed property; it was modified by the doctrine of comity in relation to succession to moveables belonging to a deceased person, which devolved according to the law of the country where he last had his domicile.

Comity occupied the same place in private law as the notion of "*temperamenta*" in the international law between sovereign states. In the one case as in the other, there was the idea of a milder custom modifying the operation of the strict law. The concession to a personal law fell short indeed of a legal rule, it was in the discretion of the Court to show this courtesy or not; but the practice gradually became so regular that it had the force of law. And as everywhere the personal law was fixed by the domicil, the maxim, "*mobilia sequuntur personam*" came to involve that moveables were distributed on an intestacy, and their disposition by will determined, according to the law of the domicile of the deceased.

Before the eighteenth century few countries in Europe had evolved a single national law, and the conception of nationality was hazy and undeveloped. Questions of Conflict of Laws arose mainly over the property or rights of merchants who were living out of their country; so that the natural and almost necessary foundation of the personal law was the place of permanent residence rather than the country of origin or the country which claimed political allegiance. The claims of the law of the nation were not put forward till a later period.

The ideas and theories of the Dutch jurists are of special importance for the study of the English practice upon the "Conflict of Laws," seeing that they formed the basis of some of the earliest English decisions on the subject which are recorded. These date from the beginning of the eighteenth century, previous to which period there is no sign that the problem of the conflict of laws presented itself either to

the English jurists or English judges (*a*). The insularity of the kingdom, the complete detachment of the English common law from the Civil law, and the national indifference to the systematic study of jurisprudence are doubtless the main causes of this neglect. The union of England and Scotland at the beginning of the eighteenth century changed the situation, involving as it did the administration of two different systems of law by one supreme Appellate Court. Scottish law was largely based upon Roman law, and was fundamentally different from English; and henceforth our courts had frequently to determine suits about succession, raising the question of the law which was to determine the rights to the property of a Scotchman who had lived in England, or *vice versâ*. Many English and most Scottish lawyers at the time were in the habit of completing their legal education at one of the Dutch universities, and in the absence of any English books of jurisprudence upon the system of private international law (as it came afterwards to be known), it was natural for the courts to turn to the opinions of those Dutch publicists with whose writings they were familiar for a statement of the accepted practice of nations.

The earliest reported decision indeed upon the law governing the moveable succession of a foreigner who died within the English jurisdiction contains no reference to the Dutch jurists, nor is it concerned with a Scotchman. The case is that of *Pipon* v. *Pipon*, 1744 (Amb. p. 25), where the question was as to the succession to one Pipon, an English subject domiciled in Jersey, where he had died. A debt of £500 was due to him in England, and there was a contest between the

(*a*) There are a few cases in the sixteenth and seventeenth centuries which lay down the need for a separate English administration by English courts for a person having property abroad; but they deal entirely with procedure and not with the substantive law to be applied to succession. It may be mentioned, however, that till the middle of the eighteenth century different rules of succession were applied in the two ecclesiastical provinces of Canterbury and York; and the rules of the province in which the deceased resided at death were held to govern the whole personal estate. Cf. Lord Hardwicke's judgment in *Pipon* v. *Pipon* (2 Ambler), which is considered later.

plaintiff, who, as the representative of several of his sisters, was entitled to a share of it by the English Statute of Distributions, and the defendants, who were several sisters, and were entitled by the custom of Jersey to the whole. A case was cited from Dyer that a bond debt was distributable according to the law of the place where it was owed. For the defendants it was urged that if the effects of a deceased were distributed according to their locality, it would greatly affect the public funds; for no foreigner would be concerned in them, if after his death intestate his personal estate here were distributed according to our laws, and not according to those of his own country. Lord Hardwicke accepted this argument, derived from public policy, and directed that the £500 should be distributed according to the law of Jersey. There is, however, evidence in his judgment of the recognition of a principle forming part of the *Jus Gentium* where he says:—"If I were to go into the general question, the personal estate follows the person, and becomes distributable according to the law and custom of the place where the intestate lived"(*a*). These words show that the principle of distribution of the personal estate according to the law of the domicile was already current, though the sanction for it was not definite. And in the case of *Thorne* v. *Watkins* (1750, 2 Ves. Sen. 35)—where the circumstances were somewhat similar to those in Pipon's case, save that here the deceased was resident in England, and the debts and choses in action, about which the suit arose, were in Scotland—Lord Hardwicke again laid down that debts follow the person of the creditor, and repeated the consideration of public policy in favour of distributing personal estate by the law of the deceased's domicile. The more abstract justification of the rule—viz. that moveable goods cannot be considered as having a local situation, and therefore are naturally regarded as attendant upon the person of their owner—is given in Lord Loughboro's judgment in the Bankruptcy case of *Sill* v. *Worswick*, 1790 (1 H. Bl. at p. 690). The notion of domicile, it

(*a*) Cf. App. D in Ambler's Report, where the judgment is given at length.

should be said, was at this period not clearly distinguished from residence; and the English courts held in several cases that it was the law of the deceased's residence at the time of death which determined the distribution of the personal estate (cf. *Burns* v. *Cole*, 1762, 2 Ambl. 415, and the two other cases there cited referring to the estates of persons dying in Jamaica).

In Scotland, indeed, during the eighteenth century, the tendency of the courts was to hold that the personal property of a deceased intestate was to be distributed according to the *lex rei sitae*, and not by the *lex domicilii*. The judges were influenced by a mediæval Scotch statute directing the disposition of property in that way; and from the beginning of the seventeenth century to the end of the eighteenth a number of decisions were given in which the personal as well as the real property of a deceased foreigner, which was found within the jurisdiction, was distributed according to the Scottish law as the *lex loci rei sitae*. (Cf. the cases cited in *Bruce* v. *Bruce* (1790), Brown's P. C. VI. 566.) Thus in the case of *Melvill* v. *Drummond* (Durcie fol. 723), the court adopted the rule: "*bona tam mobilia quam immobilia regulantur juxta leges regni et loci in quo bona ea jacent et sita sunt.*" But the supremacy of the *lex loci rei sitae* was shaken, as the theories of the Dutch jurists became accepted; and, finally, it was displaced when the decisions of the Scottish courts upon the succession to the personalty of Englishmen who had died domiciled in that country, or of Scotchmen who had left property in England, came up before the House of Lords for revision. For the House of Lords acted upon the Dutch-English doctrine of Comity.

Thus in the case of *Bruce* v. *Bruce*, 1790 (2 B. & P. 229), there was a question of succession to a Scotchman who had died in India while in the service of the East India Co., and it was held that the law of England applied on the ground that the deceased had an Anglo-Indian domicile. The decision did not, however, exactly involve the question of law whether the personal property was distributable by the law of the

domicile or the law of the place, because it was found as a fact that he was domiciled at the same place as the property was situate, *i.e.* India, so that Anglo-Indian law applied in any case. But the legal point was argued with great elaboration, and the opinions of the great Jurists such as Voet and Vattel were quoted in favour of the law of the domicile; and it was urged that to apply the *lex loci rei sitae* would be contrary to the law of nations, and introduce confusion in the administration of the estate.

In a subsequent case the question arose whether the heir to the Scotch real estate was subject to the English doctrine of election as to the personal estate which was in England (*Balfour* v. *Scott*, 1793, 6 Bro. P. C. 534). An intestate domiciled in England left real estate in Scotland, which fell by the Scottish law to a peculiar heir; and though the Scottish law directed that the heir could not take a share in the moveables, except on condition of bringing into hotchpot or collating immoveables, it was held that as he was entitled to the personal property by the law of the testator's domicile, independently of his right to the immoveables under the Scottish law, he could claim his share of the moveables as well in Scotland as in England without collating the real estate.

Finally, the rule is regarded as settled in favour of the application of the law of the domicile to the distribution of the personal estate in the case of *Somerville* v. *Lord Somerville*, 1801 (5 Ves. 750). The question in that case was whether the succession to the personal estate of Lord Somerville, who died possessed of personal property to a large amount in the English funds, should be made according to the law of Scotland or the law of England. The Master of the Rolls (Sir W. Arden), after remarking upon the frequency of questions on the law of succession to personal estate, accepts as settled law the rule laid down in the House of Lords by Thurlow, L.C., and Loughborough, L.C., that "The succession to the personal estate of an *intestate* is to be regulated by the

law of the country in which he was a domiciled inhabitant at the time of his death, without any regard whatsoever to the place either of his birth or his death or the situation of the property at that time. This," he said, " was now the admitted law for the whole of Great Britain, whatever might have been the opinion of the Courts of Scotland, though certainly they at one time took a different course." Henceforth the principle that the law of the domicile applies is not seriously contested, at any rate in cases of conflict between English and Scottish law, and in cases of intestate succession. The law was not yet equally clear that a will must satisfy the forms of the law of the domicile.

The case of *Somerville* v. *Somerville* raised, however, a further question which was not so easily settled, as to what constituted the domicile. In the early cases the question was not considered with any great care, and it seems to have been assumed that the place where the deceased had been residing for some time before his death was the domicile. (See *Burns* v. *Cole*, sup. p. 8). The definition of domicile in the Civil Law as " *Ubi quis larem rerumque ac fortunarum summam constituit*," was taken as the criterion. The more exact determination of the doctrine was largely worked out in another branch of law by Sir William Scott (afterwards Lord Stowell). That great Jurist, as head of the Admiralty Court during the Napoleonic wars, elaborated the idea of domicile in his prize decisions upon enemy property; and being at the same time head of the Ecclesiastical Court in London, and having in that capacity to determine questions of succession, he brought his more accurate doctrines to bear upon such cases. In the Somerville case it was suggested that the domicile of the deceased was double, as the family seat was in Scotland, while he had resided largely in a leasehold house in London; and therefore it was argued that the law of the domicile could not be applied. The Court, however, came to the conclusion that the domicile of origin, which arises from birth and connections, remains in such a case, until it has been clearly abandoned,

and another taken; and that in this case there was not sufficient to displace the original Scottish domicile. It was indeed remarked *obiter*, that when there was no known domicile of origin, and consequently two different domiciles were simultaneously acquired, and both equally retained, then of necessity the *lex loci rei sitae* would determine the personal succession. But the dictum was never acted upon, and it was subsequently held in *Forbes* v. *Forbes*, 1854 (Kay 341), that a man can only have one domicile for purposes of succession.

The important point of the Somerville decision was the emphasis which it laid upon the domicile of origin as the determining factor. It is significant that the notion of an original and permanent character adhering to the individual throughout life, which became the outstanding ingredient of domicile in English law, and distinguished it from the idea of domicile in other systems, was formulated very clearly by Lord Stowell in his prize decisions. In a famous case (*The Indian Chief*, 1801 [3 C. Rob. 12]), where he was adjudicating upon the property of an American merchant who had taken up residence in British territory, but at the time of the capture was about to return to his native land, he said: "The national character of Mr. J. as a British merchant was founded on residence only; it was acquired by residence and rested on that circumstance alone; it must be held that, from the moment he turned his back on the country where he had resided on his way to his own country, he was in the act of resuming his original character and is to be considered as an American. The character that is gained by residence ceases by residence. It is an adventitious character which no longer adheres to him from the moment that he puts himself in motion *bonâ fide* to quit the country *sine animo revertendi*." Here it is true the Judge was referring to a resumption of national character immediately upon leaving an acquired trade domicile; but the same principle was later applied in cases of succession to the domicile of origin, which adhered to a person throughout his life, save in so far and so long as it was clearly replaced by a domicile of choice.

Nationality was not, and has never been, recognized as the basis of the personal law in English jurisprudence; but the stress laid upon the domicile of origin and the requirement of clear proof that it has been abandoned for a domicile of choice established a close relation between the English conception of domicile and the foreign conception of nationality. Domicile, indeed, was a species of nationality, only more easily assumed and more easily divested; and until the middle of the nineteenth century the difference between domicile and nationality is not clearly apprehended. It was the existence of different systems of law within the British Empire which made it impossible to determine the legal system governing his personal status and personal rights by a national law—because there was no single British national law—and recourse was therefore had of necessity to the principle of domicile, to determine the law to be applied to the moveable succession of a person who left property in different parts of the Empire. A person was considered *primâ facie* to be subject to the law of the place in which his father had his fixed residence when he was born; and if after reaching manhood he moved from there, he was considered to have subjected himself to the law of that part of the kingdom or the Empire in which he had taken up his permanent residence *sine animo revertendi.*

But the rule was not readily extended to the case of a British subject who had removed to a foreign country, and whose succession came before an English Court. A new principle here came into conflict with the notion of domicile as a standard of personal law; the principle of the old English law: "*Nemo potest exuere patriam.*" The idea generally obtained that the political status of a British subject could not be discarded so as to enable him to take on a new civil status. Hence his *domicilium originis* followed him when he moved his residence abroad. Thus in *Curling* v. *Thornton*, 1823 (2 Add. 6) a case which came before Sir John Nicholl in the Prerogative Court, the judge held good a will made in accordance with English forms by an English subject, who had been authorized

to establish his domicile in France; he distinguished between the succession to the personal estate of a British subject dying domiciled in any part of the British Empire and of one dying domiciled in a foreign country. "The difficulty," he said, "of a British-born subject shifting his *forum originis* for a foreign domicile must be infinitely greater and more considerable. It may even be doubted whether this can be—whether a British subject is entitled so far *exuere patriam* as to select a foreign domicile in complete derogation of his British, which he must at all events do, in order to render his property in this country liable to distribution according to any foreign law." In other words, his opinion was that the domicile at the time of death regulated the succession to personal property, when a British subject died within the British Empire, and the domicile of origin when he died outside the Empire.

The application of the law of domicile was further restricted in the Judge's opinion by a distinction between testate and intestate succession. "In the case of a will," he added, "there can be neither cause nor need for any inquiry as to which is the testator's domicile; and it should seem by no means to follow universally even upon principle that a will to be valid must strictly conform to that law which would have regulated the succession to the testator's property if he had died intestate. No adjudged case, not even a single *obiter dictum*, has been cited which can be taken to countenance that notion." He applied therefore to the will before him the principle of the law of contract laid down by Lord Mansfield in *Robinson* v. *Bland* (1 W. Bl. 234), viz. that contracts are to be expounded according to the *lex loci*, *i.e.* the law of the place where they are made, save when the parties had in view a different place. He did not have regard to the fact that the will was not considered in English law as a contract, nor that in earlier cases the courts had disregarded wills which were not formally valid according to the law of the testator's domicile (cf. *Bruce* v. *Bruce*).

The same judge, a few years later (1831), pronounced, in the case of *Stanley* v. *Bernes* (3 Hagg. Eccl. 374 & 447), in

favour of a will and two codicils executed according to Portuguese law by a testator domiciled in Portugal, and also of two further codicils to the same will executed according to English law, thus allowing the law both of the domicile of choice and the domicile of origin to be applied to one succession. A case, of *Waddington* v. *Waddington*, in which the English tribunal had judged of the validity of a will made by an Englishman domiciled in France by French law was urged before him. But he refused to apply the law of the domicile so as to invalidate the last two codicils on the various grounds which he had put forward in *Curling* v. *Thornton*, and also on the ground that the testator's intention was the main thing to be considered—for the *Jus Gentium* favoured and inclined to give effect to the testator's disposition—and it was clear in the case before him that the testator desired all his codicils to be effective.

But the Court of Delegates (the appellate tribunal in probate actions at that time), without giving any reported reasons, but doubtless upon the ground of the inconsistency of the decision, reversed the last part of the sentence, and limited the grant of administration to the will and two codicils. Henceforth the rule "*locus regit actum*" was not accepted in England for the form of wills, till the law was changed by statute.

This decision of the Court of Appeal, differing from the Judge of the ecclesiastical courts, may be regarded as the starting-point of the general acceptance of the rule that the testamentary as well as intestate succession to personalty is regulated by the law of the domicile. For it was stated by Sir Herbert Jenner in *De Bonneval* v. *De Bonneval*, 1838: "It is now settled by the case of *Stanley* v. *Bernes* that the law of the place of domicile, and not the *lex loci rei sitae*, governs the distribution of and succession to personal property in testacy and intestacy."

To the same effect are the judgments in *Craigie* v. *Lewin*, 1843 (3 Curt. 435), and *De Zichy* v. *Hertford* (*ibid.* 468), which was affirmed by the Privy Council (3 Moo. P. C. 339). In the last case the testator was an Englishman resident in Milan (then

under Austrian Government), but domiciled in England, who had made codicils valid in accordance with the forms of Austrian law, but not well executed according to the English Wills Act, 1837. It was urged that the Statute did not extend to testamentary papers of domiciled Englishmen made out of England, but that in such cases the maxim "*locus regit actum*" should apply; but Dr. Lushington, in giving the judgment of the Privy Council, pointed out that this would be an infringement of the principle accepted by the English Courts that the law of domicile regulates testacy and intestacy, and that there was nothing in the statute to support such an exception to the general principle. The Wills Act therefore applied to the testamentary documents of all persons domiciled in England, whether or not the documents were actually executed in England.

For some twenty years the English Courts strictly enforced the law of the domicile both as to the form and substance of wills; and declared invalid any testamentary instrument of an English subject living abroad, but found not to be domiciled there, which did not comply with the requirements of the English law as to Wills. Conversely, if the subject had, after making his will in England according to the English law, acquired a foreign domicile, they held that his will was invalid, for the reason that it did not comply with the requirements of the law of the domicile at the date of death. But in view of the anxiety of the Courts to uphold when possible the testator's wishes, the idea gradually gained ground that it was harsh and inexpedient to defeat the wishes of British subjects abroad by the rigid application of the doctrine of domicile to every personal succession. In 1861 an Act was passed (24 & 25 Vict. ch. 114), commonly known as Lord Kingsdown's Act, by which the Will of a British subject made *out of* the United Kingdom, whatever the domicile at the time of making the same or at his or her death, was declared, as regards personal estate, to be well executed, if it was made "according to the form required either by the law of the place where the same was made, or by the

law of the place where such person was domiciled when the same was made, or by the law then in force in that part of Her Majesty's dominions where he had his domicile of origin." Further, a Will made *within* the United Kingdom by any British subject was to be admitted to Probate, if it were executed "according to the forms required by the law for the time being in force in that part of the United Kingdom where the same is made."

By these provisions the testamentary succession to the personal property of British subjects was safeguarded, so far as the British Courts had jurisdiction, with practical completeness. Provided that the testator made a will in legal form at all, there was hardly a case in which the English courts would not hold it valid as to the personal property, as complying with one or other of the requirements of the Act. But the statute established a distinct national preference in the English courts. The succession to a foreigner, who died either in the United Kingdom or abroad, domiciled in the British Isles, remained subject before the British courts to the old strict doctrine of domicile; the only change introduced by the Act which affected foreign subjects was that no will should be held "to be revoked or to have become invalid, nor shall the construction thereof be altered, by reason of any subsequent change of domicile of the person making the same." It was held *In Re Groos* (1904, P. 269) that this section, despite the preamble to the Act, was of general application, and not restricted to the wills of British subjects, so that if a foreigner made a good will by the law of his country of origin, and subsequently came to live and became domiciled in England, the courts here would uphold it and admit it to probate.

In the same year as Lord Kingsdown's Act was passed, a further attempt was made by Parliament to ensure the validity of the wills of British subjects dying abroad, by means of international agreements upon the conditions of domicile. Reciting that: "by reason of the present law of Domicile, the Wills of British subjects dying while resident abroad are

often defeated, and their personal property administered in a manner contrary to their Expectations and Belief, and that it is desirable to amend the law, but the same cannot be effectually done without the consent and concurrence of foreign States,"—the Act (24 & 25 Vict. ch. 121) provides for the making of Conventions with any foreign state by which no British subject should be held to have acquired a domicile in that foreign country, unless resident there for at least one year immediately preceding his or her death, and unless he or she shall also have made or deposited in a Public office of the foreign country a Declaration in writing of his or her intention to become domiciled there. If these conditions were not complied with, he or she should be deemed to retain, for all purposes of testate or intestate succession as to moveables, the domicile he or she possessed at the time of going to reside in the foreign country. Power was given to make reciprocal provision for foreign subjects dying in the United Kingdom; but this part of the Act has remained a dead letter, as well for British as for foreign subjects, since no convention has ever been made in accordance with its terms between the British government and any foreign state. If the Act had been adopted, it would have assimilated the English doctrine of domicile with that which existed in most continental countries, where express recognition or authorization by the state of the change of residence was regarded as a necessary condition of the substitution of a new personal law for that of the country of origin. The Act in fact proposed to whittle away the Common Law doctrine, but the change of standpoint on the Continent made it of no effect.

From the beginning of the nineteenth century, the principle basing the personal law upon nationality was continually gaining ground in Europe upon the principle of domicile, till, finally, it practically supplanted it. The change in the *Jus Gentium* was but the legal reflex of the revolution in political life, which was brought about by the French Revolution and the attendant intensification of national feeling. In the British Isles, partly owing to the heterogeneous character and origin of

its population, which enjoyed different systems of law, and partly owing to its older-established political unity, the same change of ideas did not show itself, and hence the divergence between the English and the foreign law as to the succession to the personal property of a foreigner within the jurisdiction became more and more marked. The English adherence to the principle of domicile was shared by the United States of America, where again there was a collection of States under one sovereignty with different systems of private law.

The first signs of the conflict between the English and the continental ideas of the criterion of the personal law occur as early as 1841 in the case of *Collier* v. *Rivaz* (2 Curt. 855), which was concerned with the succession of an English testator who died in Brussels, leaving a will and codicils not validly executed according to the Belgian law, but which would have been admitted to probate if his domicile had been in England. There was evidence before the English Court that the Belgian law of succession did not apply to the moveables of a foreign resident, unless he had acquired a domicile by authorization in that country—which was not done by the testator in this case. In default of this condition, the Belgian courts would apply the law of the deceased's nationality. The English Court accordingly accepted what is called the renvoi or the reference back by the law of the domicile to the law of the nationality, and admitted this will to probate, on the ground that (1) the Belgian courts would have upheld it as executed according to the forms required by the testator's national law, and (2) the English Court decides the case from the evidence of persons skilled in (Belgian) law, and decides it as it would have done if sitting in Belgium.

The law of the domicile which the English Court would apply was therefore to be understood not as the rules of succession which the Court of the domicile applied to its own subjects in general, but the rules which it would apply to the particular case before the Court; and if the foreign law had a different rule of private international law from that applied by English

law, the English Court paid respect to the difference, and might therefore apply the English national law, not indeed as such, but as the law prescribed by the foreign domicile.

The judgment in *Bremer* v. *Freeman*, 1857 (10 Moo. P. C. 306), where the circumstances were somewhat similar but the result different, was not indeed inconsistent with this principle, but really an illustration of it. There the Court had to consider the will of an English lady married to an Italian, who had died in Paris after a fixed and uninterrupted residence for fifteen years, leaving a will executed in Paris according to the Wills Act. It held that the will was invalid because the testatrix was domiciled in France, and being made before Lord Kingsdown's Act, the will of a British subject domiciled abroad had to be executed according to the forms of the law of the domicile. Whereas in *Collier* v. *Rivaz* the evidence was that the Belgian law did not recognize at all a domicile which had not been officially authorized, the evidence here was "that the great weight of authority is in favour of the position that the authorization of the Emperor is not necessary in order to establish a domicile for the purpose of succession." Reliance was placed especially upon the opinion of Merlin, who declared that a foreigner, who establishes his domicile in France without the permission of the Government, submits himself by that act alone to the jurisdiction of the French Tribunal, and determines by that act alone the competence of the Judge who, after his death, takes cognizance of his succession that he leaves in France.

II.—*Modern Views on Domicile and Nationality.*

Although the English Courts adhered to the doctrine of domicile as the basis of the personal law (save in so far as it was modified by statute), they maintained their prejudice against admitting the acquisition of a foreign domicile by a British subject; and were apt therefore to confuse political allegiance with domicile for civil purposes. The tendency is illustrated

by two judgments of Lord Cranworth, L.C., in the House of Lords (*Whicker* v. *Hume*, 1858, 7 H. L. 124; and *Moorhouse* v. *Lord*, 10 H. L. 272). In the first the question arose about the will of a testator who had his domicile of origin in Scotland, but had subsequently lived in New South Wales and England, and finally removed to, and made his will and died in Paris. The Lords held that the domicile of the testator was English, and the will therefore valid; and doubtless that decision was justified by the evidence. But Lord Cranworth went out of his way to assert a difference between the elements required to constitute change of domicile to a foreign country or to another part of the United Kingdom. "You may much more easily suppose," he said, "that a person having originally been living in Scotland—a Scotchman—means permanently to quit it and come to England, or *vice versâ*, than that he is quitting the United Kingdom in order to make his permanent home where he must be for ever a foreigner, and in a country where there must always be those difficulties which arise from the complications that exist and the conflict between the duties you owe to one country and the duties that you owe to the other."

In the second case, where the circumstances were similar, save that the intermediate residence was in India, he went still further. "In order to acquire a new domicile," he said, ". . . a man must intend *quatenus in illo exuere patriam*. It is not enough that you merely mean to take another house or some other place, and that on account of your health or for some other reason you think it tolerably certain that you had better remain there all the days of your life. That does not signify. You do not lose your domicile of origin or your resumed domicile, merely because you go to some other place that suits your health better, unless indeed you mean either on account of your health or for some other motive to cease to be a Scotchman and become an Englishman, a Frenchman or a German." He went on to say that "any other inference would be inconsistent with all the modern improved views

of domicile." And Lord Kingsdown, in giving judgment in the same case, gave it as his opinion that "change of residence alone, however long and continued, does not effect a change of domicile as regulating the testamentary acts of the individual. It may be and is strong evidence of an intention to change the domicile, but unless in addition to residence there is intention to change the domicile no change of domicile is made." He appealed to a remark of Dr. Lushington in the case of *Hodgson* v. *De Beauchesne* (12 Moo. P. C. 385) in support of the proposition that to oust the domicile of origin a man must intend to become a Frenchman instead of an Englishman. Dr. Lushington had, in fact, given colour to this idea that a change of domicile involved a change of political nationality in a passage where he said that, "a settled domicile in a country imposes an allegiance to the country, very different from a man's allegiance to its laws during a temporary residence;" but this remark was obiter.

In effect, the "improved views of domicile," set forth in these judgments, required an English subject abroad to take some definite step, such as the application for authorization from the foreign government to establish his domicile, as a condition precedent of the change of his personal law; and though, undoubtedly, the English conception of domicile held that mere change of residence was not sufficient to constitute subjection to a new law, the dicta of these Judges, it is submitted, went beyond the accepted doctrine, and started a tendency, which was not maintained, to make political nationality—under another name—the basis of the law governing the succession of British subjects dying abroad.

Similar views were expressed about the same time by the Scottish Courts, *e.g.* by Lord Curriehill in *Donaldson* v. *McClure* (1857, 20 D. 307), where he said in language which is rather loose and exhibits some confusion between domicile and political nationality: "To abandon one domicile for another means something far more than a mere change of residence. You show an intention not only to relinquish those

peculiar rights, privileges, and immunities, which the law and the constitution of the domicile confer on the denizens of the country in their domestic relations, in their business transactions, and their political and municipal status, and in the daily affairs of common life, but also the laws by which the succession to property is regulated after death."

It was with special reference to these expressions of judicial opinion that Lord Hatherley and Lord Westbury laid down anew the English doctrine as to domicile in the case of *Udny* v. *Udny* (1869, L. R. Sc. App. I, 441); and put it on a sounder and clearer footing than their predecessors had done. The issue in the Appeal was whether the Respondent had become legitimate *per subsequens matrimonium;* and this issue turned upon the question of the domicile of his father, who had a domicile of origin in Scotland, had subsequently lived thirty-two years in London, but then, having fallen into pecuniary difficulties, had resided in Boulogne for nine years. The House of Lords held that he had given up his English domicile of choice and resumed his domicile of origin. The decision is of great importance as defining the exact nature of a domicile of origin and its relation to a domicile of choice. Every person, it was declared, is invested involuntarily and by law with a domicile of origin as soon as he is born; if the child is legitimate, the law attributes to him the domicile of his father; if illegitimate, the domicile of his mother. The domicile may be extinguished by law, as by exile for life, but it cannot be destroyed by the will and act of the party; and when a different domicile of choice is acquired, the domicile of origin is only in abeyance, reviving immediately the other is abandoned, and it continues until a second domicile of choice has been acquired.

This conception of a domicile of origin which adheres to a man permanently and is only ousted by a clear adoption of another home, constitutes, as has been remarked, the specially English character of domicile, and gives it some of the features of nationality; but the Judges in the House of Lords were

at pains to point out the vital differences between it and political nationality, no less than those between it and mere residence. "I think," said the Lord Chancellor (Lord Hatherley), "some of the expressions used in former cases as to the intent *exuere patriam*, or to become a Frenchman instead of an Englishman, go beyond the question of domicile. . . . The question of naturalization and of allegiance is distinct from that of domicile. A man may continue to be an Englishman, and yet his contracts and the succession to his estate may have to be determined by the law of the country in which he had chosen to settle himself. He cannot, at present at least, put off and resume at will obligations of obedience to the government of the country of which, at his birth, he is a subject, but he may many times change his domicile. It appears to me, however, that each acquired domicile may be also successively abandoned simpliciter; and that thereupon the original domicile simpliciter reverts."

Still more exact were the words of Lord Westbury, who brought to bear upon the question of domicile not only splendid powers of reason but an unrivalled knowledge of Roman law. He distinguished between the political status, "by virtue of which each individual becomes the subject of some particular country, binding him by the tie of national allegiance," and the civil status, "by virtue of which he is possessed of certain municipal rights and subject to certain obligations." His statement was indeed too sweeping when he said that "the civil status is governed universally by one single principle, namely that of domicile," on the basis of which the personal rights of the party must depend; since the Code of Italy had already declared that such rights depended upon nationality. But he was on sure ground when he criticized the conclusion stated in Story's "Conflict of Laws," to the effect that "the results of the more recent English cases seem to be that for a change of national domicile there must be a definite and effectual change of nationality." Story's conclusion was based on the dicta of *Moorhouse* v. *Lord*, that for the acquisition of a French

domicile "a man must intend to become a Frenchman instead of an Englishman"; and Lord Westbury comments thereon: "These words are likely to mislead, if they were intended to signify that for a change of domicile there must be a change of nationality (*i.e.* of national allegiance). That would be to confound the political and civil status of an individual, and to destroy the difference between *patria* and *domicilium*." In another part of his judgment he corrected the opinion of the tribunal in *Moorhouse* v. *Lord* as to what was necessary to constitute a domicile of choice. "It is," he said, "a conclusion or inference which the law derives from the fact of a man fixing voluntarily his sole or chief residence in a particular place, with an intention of continuing to reside there for an unlimited time." (see at p. 458).

The principles of domicile laid down by Lord Westbury were held to be the better opinion, and were followed by the Chancery Judges, in preference to the principles of Lord Cranworth, in *Haldane* v. *Eckford*, 1869 (Sir William Jenner, V. C.; L. R. 8 Eq. 631), and in *Douglas* v. *Douglas*, 1871 (Sir J. Wickens; L. R. 12 Eq. 617), and in *Re Groves*, 1888 (Sir J. Stirling; L. R. 40 C. D. 268). These Judges explicitly rejected the dicta in *Moorhouse* v. *Lord* which had been followed in two cases in the Exchequer—in *Re Capdeville* (2 H. & C. 985), and *Attorney-General* v. *Countess de Wahlstadt* (ibid., 3, 374); and in each case they pointed out the difference between nationality and domicile.

The force of the old maxim "*nemo potest exuere patriam*" was about the same time greatly weakened by the passing of the Naturalization Act, 1870, which in section 6 provided that any British subject who became naturalized in a foreign state should from that time be deemed to have ceased to be a British subject and be regarded as an alien. Henceforth it was open to a British subject abroad to assume one of three conditions: he might (1) show an intention of not taking up permanent residence in any foreign country or of returning to some part of the United Kingdom, in which case he retained his domicile of

origin; (2) take up a permanent residence in a foreign country without expatriating himself, in which case he so associated himself with the foreign society as to become subject to the foreign law for civil purposes; or (3) take up permanent residence and be naturalized in a foreign country, in which case he changed not only his personal law but also his political allegiance. In each case he could act according to his own volition, and the state did not interpose any compelling authority or abstract principle to prevent his intentions being carried out. It has been said, indeed, that the exigencies of practical life have modified domicile in the direction of nationality, and modified nationality till it has almost become domicile. But the saying was true rather of the tendency of the first half of the nineteenth century than of the second. It might be truer to say that the differences between the conception of domicile and nationality have been accentuated; for while English law has tended to make permanence of residence again the main ingredient of domicile, the codes of many continental powers have exalted nationality to an indissoluble tie between the state and the individual.

The willingness of the English Court to accept a deliberate and fixed change of residence as sufficient foundation for a change of personal law is well illustrated by the case of *Hamilton* v. *Dallas* (1875, 1 Ch. D. 257), where Vice-Chancellor Bacon held that an English peer was not by reason of his obligation to attend the House of Lords incapacitated from acquiring a domicile *de facto* in France, and directed certain personal property of Lord Howden, in respect of which there was an intestacy, to be distributed according to the French law. The same Judge had held conversely in *Brunel* v. *Brunel* (1871, 12 Eq. 298) that an English domicile was acquired by a French subject who had carried on business, married, and resided in London for thirty years, though he had refused to take out Letters of Naturalization on the express ground that he would not give up his status as a French citizen and might return to France. The Court of Appeal followed the same doctrine in

Doucet v. *Geoghegan* (9 C. D. 441). Dr. Westlake submits upon the authority of these cases that a foreign person *sui juris* may acquire an English domicile and subject himself to a new personal law, though the country which he has abandoned may still claim to determine his personal law according to his continuing political nationality; and though this has never been held explicitly, it would seem to follow from the principle that English law is supreme within English territory. It is further submitted that the condition upon which domicile is attributed by our courts to a foreigner resident here, ought to be applied to the determination of the domicile of a British subject resident abroad.

In very recent years, however, there have been signs that the doctrines of *Moorhouse* v. *Lord*, though in a more scientific guise, are winning their way back into the approval of the highest English tribunal. In *Winans* v. *the Attorney General* (1904, A. C. 287), after the Divisional Court and the Court of Appeal had held that Mr. Winans had changed his domicile from the United States to England by continuous residence in this country, Lord Macnaghten moved that their decision should be reversed on the ground that it was not proved that the testator had at the time of his death formed a fixed and settled purpose, a determination, a final and deliberate intention to abandon his American domicile and settle in England, or that his conduct and declarations led to the belief that he would have declared such an intention if the necessity of making the election between the countries had arisen. Lord Halsbury accepted this view, and it prevailed in the House. Lord Lindley indeed, in giving judgment, declared explicitly that a change of domicile may be imputed though the person has no desire or intention to change his national allegiance. "When an Englishman," he said, "leaves England where he is domiciled, and goes to the United States, he changes his domicile if he intends to settle in the new country, and to establish his principal or sole or permanent home there, even though the legal consequence of his so doing may never have entered his

mind; and though he may have had no intention of becoming an American citizen, and has remained a British subject to the end of his life" (ibid., at pp. 299–300).

Subsequently, however, in the case of the *Marchioness of Huntly* v. *Gaskell* (1906, A. C. 56), Lord Halsbury explicitly reasserted the ideas on the change of domicile which had been laid down more than half a century back, and had since been in part repudiated. Quoting Lord Cranworth's dictum—"In order to acquire a new domicile a man must intend *quatenus in illo exuere patriam*"—he continued: "I venture to translate those words into English as meaning that he must have a fixed intention or determination to strip himself of his nationality, or in other words to renounce his birthright in the place of his original domicile. The serious character of such a change is very well expounded by Lord Curriehill in the case of *Donaldson* v. *McClure* (1857, 20 D. 307). . . ." And then he sets out the passage already cited above (*a*). The other Lords, indeed, did not found their judgments, rejecting the alleged change of domicile, upon the doctrine of the old authorities, but simply upon the evidence in the particular case. The retrogression, however, has been made, and the confusion of domicile and allegiance, carefully dissected by Lords Westbury and Hatherley, and Lindley, seems to have taken on a new lease of life. It remains to be seen whether a future Lord Chancellor, with his ideas strongly rooted in the common law, will once again establish the conception of domicile upon a clear and definite foundation of fact, and free it from the vague associations of political surmise.

Since the decision in *Huntly* v. *Gaskell*, there have been two judgments upon the acquisition of a colonial domicile by a British subject, one by a Scottish, the other by an English Court: *The Lord Advocate* v. *Brown's Trustees* (1907, 44 S. L. R. 275); and *James* v. *James* (98 L. T. 438). In the first the question was whether a man who had a domicile of origin in Scotland, but had emigrated to Ceylon and lived there for thirty

(*a*) See p. 21.

years, and died while on a short visit to his native country, had obtained a domicile of choice in Ceylon. It was urged against this that there was no reported case of a British subject being held to have obtained a colonial domicile by settlement in a tropical colony; but the Scottish Court of Session held that there was no impossibility in the way of such a result, though stronger evidence of intention would be required than when the settlement had been in temperate regions. It did not consider the question of putting off the "*patria*"; and as there was strong evidence in the case both of the *factum* and *animus manendi*, the Court held that the deceased had abandoned his domicile of origin and acquired a Cingalese domicile.

On the other hand, in the case of *James* v. *James*, Mr. Justice Eve held that where a testator who had a domicile of origin in Wales and lived there nearly forty years, migrated under medical advice to South Africa and remained there, with the exception of one visit to England, till his death, he continued to be a domiciled Englishman. The deceased had said that he would remain permanently in South Africa, but he had written to the end of going "home"; and this evidence might have been sufficient on which to hold that the onus of proof of a change of domicile had not been satisfied. But the Judge based his judgment in part upon the words of Lord Halsbury in *Huntly* v. *Gaskell*, which he quoted in full, and thus introduced the question of abandoning a "birthright." It is submitted that the new series of dicta, reviving the suggestions of Lord Cranworth and in conflict with the reasoning of Lord Westbury, tend to cloud the question of domicile again; and to introduce for British subjects resident in a colony or a foreign country a different rule from that which is applied to a foreign subject resident in Great Britain. If the clear intention to adopt a new allegiance is to be made the test of the acquisition of a domicile in a foreign country by a British subject, the same test must be applied upon the principle of reciprocity to the acquisition of an English domicile by a foreign subject (*a*).

(*a*) It is interesting to note a criticism of the decision in *Re James* which

So far there is no decision which supports the abandonment of the old English standpoint in this direction; and the judgments in *Re Martin: Loustalan* v. *Loustalan,* L. R. (1900, P. 211), dealing with the domicile of a French refugee, show no trace of such a tendency.

Nor is the unwillingness to impute a foreign domicile to a British subject likely to be a benefit to Englishmen living abroad. It may often be the ground for a double impost of death duties, since it will be claimed that English succession and legacy duty are due upon the whole of their personal property in virtue of their retained English domicile, and at the same time their personal succession will be liable to the foreign death duties in virtue of their permanent residence in the colony or foreign land. Formerly the reason for the unwillingness to admit the acquisition of a foreign domicile by a British subject was the desire to uphold his testamentary disposition: to-day that reason does not hold; and the effect of the return to the old standpoint is to make the British subject liable to the demand of rival tax-collectors.

Upon the Continent, the development of the law of succession during the last fifty years has gone upon different lines. The principle of domicile has not been so much modified as abandoned in favour of the principle of nationality. The Code Napoléon of 1803 provided that the laws concerning the status and capacity of persons governed Frenchmen, even though residing in foreign countries. This same principle was adopted in the Austrian Code of 1811; and subsequently when the Italian nation was unified, it received an extended application and a new philosophical justification from the jurist Mancini. Not only did the Italian law apply to Italian subjects abroad, but the national law of foreigners resident in Italy was declared

appeared in Clunet's " Revue de Droit International " (1910, vol. 37, p. 1262). The writer attacks the absence of reciprocity in the English attitude, and uses it to argue against the acceptance of the Renvoi. He complains that the English courts attribute an English domicile to a British subject abroad in any case, but will not allow a foreigner settled in England to retain his national law.

to govern all matters of their personal status. The principle of the national doctrine is thus stated by Weiss : "La loi laquelle statue sur un intérêt privé a toujours pour objet l'utilité de la personne. Elle ne peut régir que ceux pour qu'elle a été faite : mais ceux-là elle doit en principe les régir en tous lieux, et dans tous leurs rapports juridiques, sauf les conceptions ou atténuations qui remettent de l'ordre public international, de la règle locus regit actum, et de l'autonomie de la volonté."

It is represented that until the new order of society was established in the nineteenth century, domicile had been the necessary criterion of the personal law, because there were so few nationalities with separate political existences; but now that Europe is divided up into a number of national communities, the tie of national association, which is more valid than that of locality of residence, can and should have its full effect. Italy, the German Empire, and several smaller states have adopted in turn the new principle, and applied it as the general rule to regulate succession to personal property, domicile coming in if at all by the way of exception and supplement. Owing to this development, the idea of a common doctrine of private international law, *i.e.* of certain principles which are universally applied to harmonize the conflict of jurisdiction and laws, is seriously affected. For example, if to-day an Englishman dies domiciled by English law in Italy, and leaves personal property in Italy which is not disposed of by any will, an English Court having jurisdiction over the estate will first of all have to consider the law which is to be applied to the distribution of the personalty, and will choose the Italian law. But it will have to take account of the fact that the Italian law contains a rule by which the personal property of a foreign resident is distributable according to the law of his nationality, and therefore it has to determine whether that principle of the Italian law is to be applied, or the English rule as to the personal law be treated as dominant.

Private international law to-day is not only concerned with

the determination of the law of a particular country to regulate a particular subject, but also with the determination of the particular principle for resolving the conflict, which varies in different countries. Hence there has grown up a new topic or rather a new science of a science—in which a large place is taken by the doctrine known as the renvoi—which is concerned with the resolution of the difficulties arising from the existence of different principles as the basis of the personal law. The struggle between domicile and nationality, as the basis of the personal law, is a struggle between two great political principles. The countries which uphold domicile accord greater freedom to the individual, and do not insist upon uniformity of national outlook; the countries which uphold nationality assert the right and power of the State to control the ideas and relations of the individual wherever he may go, and require a single outlook upon certain questions of the family from all their subjects. In order to surmount the difficulty caused by the existence of varying principles of private international law in England and Continental countries, our Courts have tended to accept the reference back to our internal law made by the law of the foreign domicile. This part of the subject is discussed at fuller length in the last chapter of the book.

CHAPTER II

THE ENGLISH CONCEPTION OF DOMICILE: ITS SCOPE AND LIMITATIONS

When a person dies leaving property in two countries, and any part of his succession is administered in England, it is necessary in the first place to determine his domicile, and next to ascertain the law of that domicile as to succession. The notion of domicile, originally derived from the Civil Law, received special interpretation in the English Courts, which makes the English view of it something distinctive and *sui generis*. No single definition has been accepted by the Judges or the text-writers, but it is possible to extract from the expressions of judicial and juristic opinion a fairly clear notion of the idea which domicile connotes in English law. The definition in the Civil Law runs as follows (Code, Lib. x., tit. 39. 7): "*Ubi quis larem rerumque ac fortunarum suarum summam constituit: unde rursus non sit discessurus, si nihil avocet, unde cum profectus est peregrinari videtur, quo si rediit, peregrinari jam destitit.*" This definition contains the root not only of the English, but of all modern notions of domicile. Its influence is obvious in Story's definition: "That place is properly the domicile of a person, in which his habitation is fixed, without any present intention of removing therefrom." But the peculiar feature of English domicile, the domicile of origin, is not conveyed either by the Roman or Story's definition. This domicile of origin, which is the primary domicile of every person, is directly created by operation of law, and does not depend in any way on

his habitation or his volition. Lord Westbury, in his judgment in *Bell* v. *Kennedy* (L. R. 1 Sc. App. p. 320), pointed to the outstanding feature of the English notion in his emphatic way: "Residence and domicile are two perfectly distinct things. Domicile is an idea of law: it is the relation which the law creates between an individual and a particular locality or country. To every adult person the law ascribes a domicile, and that domicile remains his fixed attribute until a new and different attribute usurps its place." Domicile in this aspect attaches by operation of law immediately on birth, and is retained until the child or man has made choice of another home. The general rules determining it are given on p. 22.

Domicile of Married Woman.

In the case of dependent persons the law presumes that they are under the control of, and therefore gives them the domicile of, another. Thus the wife shares the domicile of her husband: *Dalhousie* v. *M'Donall* (7 C. & F. 817) and *Yelverton* v. *Yelverton* (1 Sw. & Tr. 574); and this even though she is living apart from him (*Whitcomb* v. *Whitcomb*, 2 Cur. 351; and *Re Daly's Settlement*, 25 B. 486). If, however, there has been a decree of divorce or judicial separation—which has "the same force and the same consequences as a divorce *a mensa et thoro*" (20 & 21 Vict. ch. 85, s. 7),—it is probable that she has the option of acquiring a new domicile. The point was not definitely decided in *Dolphin* v. *Robins* (7 H. L. C. 390), where it was held that as the decree of divorce given by the Scotch court was void because the parties had not a real Scotch domicile, the wife had not the power of acquiring a French domicile apart from her husband. But Lord Cranworth suggested that where a valid decree of separation or divorce was obtained from the Court, the woman would have the power of obtaining a separate domicile of choice. The same suggestion is made in *Geils* v. *Geils* (1 Macq. 258). Lord Cranworth further suggested that there might be exceptional cases to which, even

without judicial separation the general rule (of imparting the husband's domicile to the wife) could not apply, as where the husband has abjured the realm, has deserted his wife and established himself permanently in a foreign country (at p. 419). But where these exceptional circumstances do not exist, and the two parties live separated without any decree of judicial separation, even though the wife could if she chose obtain a decree of separation, it has been held that she is incapable of acquiring a separate domicile (*In re Mackenzie: Mackenzie* v. *Edwards-Moss*, the L. J. Newspaper (1911), p. 204). And in any case the domicile of the husband remains that of the wife unless and until she exercises her option of changing it by taking up a permanent residence elsewhere: *Gort* v. *Zimmerman* (5 N. C. 440), and *Warrender* v. *Warrender* (2 C. & F. 488). On the death of her husband the widow resumes her power of acquiring a domicile of choice.

Domicile of Minor.

Again, the domicile of a minor, if legitimate or legitimated, is till marriage that of his or her father; and if the father is dead it is ordinarily that of the mother during widowhood; while the domicile of a posthumous or an illegitimate minor is that of the mother. If the mother acquire a new domicile, *e.g.* by a second marriage, it is usually communicated to the children living with her: *Potinger* v. *Wightman* (3 Mer. 67); but not necessarily; and in the interest of the child she may abstain from changing its domicile when she changes her own. Cf. *In re Beaumont* (1893, 3 Ch. 490), where a Scotch widow, who by a second marriage obtained an English domicile, was held to have abstained from exercising her power of changing the domicile of one of her children who remained in Scotland. The general continental rule indeed is that a minor's domicile is fixed by the father's death and cannot be changed during the minority except by act of law; and Dicey favoured the adoption of this rule in England. It is doubtful whether a guardian has likewise

the power of changing the domicile of his ward (*Douglas* v. *Douglas*, 12 Eq. 617); but the better opinion is that he may if he acts *bonâ fide* (*Potinger* v. *Wightman* (3 Mer. at p. 80) and *Stuart* v. *Moore* (4 Macq. 1)). By marriage a male minor obtains the power of choosing a new domicile for himself, while a female infant acquires the domicile of her husband. So, too, by accepting an office from which he is not removeable, or by entering into the service of the Crown, a male minor is emancipated, and becomes capable of acquiring a domicile of choice. But if the service of the Crown should cease before he attains his majority, the parental domicile revives: *Rex* v. *Rotherfield Greys* (1 B. & C. 345), nor does the holder of an office of a temporary or revocable nature change his domicile of origin: *A.-G.* v. *Rowe* (1 H. & C. 31); *Somerville* v. *Somerville* (8 Ves. 750).

In the case of certain persons holding official positions or serving their country in foreign parts, the change of the place of residence, though in a sense voluntary, is not treated as involving the acquisition of a new domicile of choice. Thus ambassadors and consuls representing their country in foreign parts retain the domicile of the country they represent: *Maltass* v. *Maltass* (1 Rob. 79); and, as has already been noticed, a soldier or a sailor in the general service of the Crown does not change his domicile by serving for a long period in foreign parts: *A.-G.* v. *Pottinger* (6 H. & N. 733); *In re Macreight* (30 C. D. 165). On the other hand, persons entering the service of a foreign state may acquire a domicile in that state: *Ommaney* v. *Bingham* (5 Ves. 757). As to Anglo-Indian domicile, see later, p. 44 ff.

The domicile of origin may be supplanted, or rather suspended, by the adoption of a permanent home in another country, but the moment such a new home is abandoned, the domicile of origin revives, and remains till another domicile of choice is taken. The domicile of origin may also be exchanged for another domicile by operation of law, owing to the parents' change of domicile while the person is still an infant,

and this other domicile adheres until, having come of age, he obtains a domicile of choice of his own. The full effect of this doctrine and the rigidity with which it is applied are seen in the case of *In re Macreight* (L. R. 30, C. D. 165). The question was as to the succession to a military officer who had died intestate in Canada. He was born in London, but soon after his birth his parents removed to Jersey, and lived there all their lives. The deceased had obtained a commission in the British Army while his parents had their domicile in Jersey; and for the rest of his life he had served with his regiment in different parts of the world. A soldier or sailor in the service retains the domicile which he had on entering the service (*Ex parte Cunningham*, per Lindley, M.R., 13 Q. B. D. p. 425); and therefore the imputed Jersey domicile which the deceased had received from his father remained till his death, and his property was distributed according to the law of Jersey.

Domicile of Choice.

The general rule of English law is that every person *sui juris* is free to choose his own domicile and to change it whenever he pleases, and that his personal law depends on his domicile. The domicile of choice is determined by the two elements of the fact of residence and the will to remain, which must both be present to oust the domicile of origin conferred by law; and the inference that such a domicile has been obtained is made by the law upon all the circumstances of the case. It is difficult to lay down a comprehensive definition, but Dicey, after a consideration of all the cases, defines the domicile of a person as: "The place or country in which either he resides with the intention of residence, *animus manendi*, or in which having so resided he continues actually to reside though no longer retaining the intention of residence, or with regard to which, having so resided there, he retains the intention of residence, though he in fact no longer resides there." Thus when a person has once obtained a domicile of choice he must have left it with

the intention of leaving it permanently before his domicile of origin revives: *Chalmers* v. *Wingfield* (36 C. D. 40). There a testator had an Anglo-Indian domicile of origin, but had settled in Germany, and, as the Court held, had acquired there a domicile of choice. There was evidence that he intended to change his home to England or India, and he did in fact return for a time to India, but he was living at his death in Germany, and the Court found that his domicile remained German. But where a person removes from his country of origin, and settles abroad for the sake of his health, he does not acquire a new domicile of choice, if he retains all the time the intention of returning to his native country as soon as he is recovered: cf. *Winans* v. *Attorney-General* (1904, A. C. 287); but whatever the motive, if he intends to make the foreign country his permanent home, he becomes domiciled there (*ibid.*, at p. 289). To constitute the domicile the choice must amount to a voluntary purpose, and the residence must not be prescribed by some external necessity. Thus a convict or a refugee possesses the domicile of his country of origin: *Burton* v. *Fisher* (1 Milw. 183), and *Re Duchess of Orleans* (1 Sw. & Tr. 253).

Not unfrequently difficult questions arise where a man has more than one home situate in different countries as to which is to be treated as his true domicile. The place where he usually resides with his wife and family will be given the preference (*Forbes* v. *Forbes*, Kay, 341); but if this again is ambiguous, the Court will have regard to the locality of a mansion house kept by the person, to statements in his letters, to his description in legal documents, to his exercise of political rights, and any other indications of a similar kind. But in a case of doubt the leaning is always towards the domicile of origin: *Lord* v. *Colvin* (4 Drew. 366); *Stevenson* v. *Masson* (L. R. 17 Eq. 78); *Huntley* v. *Gaskell* (L. R. 1906, A. C. 56); *Munro* v. *Munro* (7 C. & F. 842).

A person can have but one domicile at a time for purposes of succession, and he cannot be without one. The English notion indeed is blended of the two ideas of national and local ties; the domicile of origin representing the first, the

domicile of choice the second idea. There being no national personal law for the British Empire, domicile is the necessary basis of the subject's legal rights in the different parts of the Empire *inter se ;* but the outstanding importance of the domicile of origin gives the principle a solidity and a broad justification which might have been lacking to the criterion of a permanent residence alone, in view of the large emigration to the colonies and the general freedom of movement which exists between different countries within the Empire. The force of a great many of the objections to domicile as the basis of the personal law is taken away by this consideration. Von Bar, for example, impugns it because of its transitory character ; but his arguments apply only to the domicile in the continental sense, and not to the specialized connotation of English jurisprudence.

It is perhaps a more valid objection to the criterion of domicile that it is frequently a matter of great nicety to determine where the domicile of a deceased person was. The question depends upon the particular facts of each case, the law, as has been noted, making an inference from the whole of the circumstances taken together. As intention is a very important ingredient, and as the intention of the deceased person can in most cases only be inferred indirectly, the determination of domicile often involves very protracted and expensive litigation. (Cf. such cases as *Bremer* v. *Freeman,* 10 Moo. P. C. 306 ; and *Re Winans,* L. R. 1904, A. C.) The attempt to provide for the definition of the conditions of domicile, which was made by the Act of 1861, has never been put into effective operation, and, as has been seen, the opinions of the Judges have varied from time to time. Nationality is a criterion which is immediately determinable : domicile in the English sense is one which in its very nature is a matter of judicial discretion. But it may be said in answer to these objections that the statutory modification of the Common Law has practically eliminated questions of the domicile of British subjects in cases of testamentary succession, and that cases of dispute about intestate succession are

comparatively rare. The majority of the modern cases about domicile arise over Death Duties, for which the liability is fixed upon a principle independent of considerations of Private International Law.

The domicile which is in question in cases of succession may differ according as the succession is testamentary or intestate; but in either case it is the domicile of the deceased, and not of the successor, which is in question. Succession, as Savigny showed, implies an artificial extension of a man's power, and therefore of his will, beyond the limits of his life; and this relation is consequently entirely and immediately connected with the person of the deceased. Succession, then, is regulated by the law which imposed the personal statute of the deceased, which in English jurisprudence is the law of the domicile. If the person died without leaving a will, or leaving a will which is invalid, it is his domicile at the time of his death which has to be ascertained; if he left a valid will, it is primarily the same domicile, but this is subject to the modification made by Lord Kingsdown's Act. A change of domicile made subsequently to the time when the will was executed will not be retrospective so as to destroy the force of the will, unless there are clear signs of an intention to do so.

Before the Act of 1861 was passed, the law was not free from doubt on the point; but it was settled by Sir J. P. Wildes' decision in *Re the Goods of Reid*, 1866 (L. R. 1 P. & D. 74), when he held that the will of a Scotchman who had made a will, and afterwards married in Scotland, and subsequently acquired an English domicile which he retained till his death, was entitled to probate in England. In England marriage revokes a will, but by the Scotch law, the will was valid, both when it was made and at the time of the marriage, and it was not revoked by a subsequent change of domicile. Similarly it has been held by a Scottish Court that when an Englishwoman makes a will of moveables, while domiciled in England, and afterwards marries in England a Scotchman domiciled in

Scotland, and finally dies domiciled in Scotland, her will is valid (*Westerman* v. *Schwab*, 1905, Sc. L. T. R. 894). By the English law the woman acquired the domicile of her husband at the moment of marriage, and therefore her will did not cease to be valid because there was no "*punctum temporis*" at which its force was dissolved.

The principle of the English Courts is to determine the effect of marriage as the revocation of a will made previous to the marriage by the law of the country where the testator or testatrix is domiciled at the moment of marriage; and as this rule has been held to be independent of the testamentary law (*In re Martin*, L. R., 1900, P. 240, per Vaughan Williams, L.J.), the proviso in Lord Kingsdown's Act will not prevent a marriage by a person, who has acquired an English domicile subsequently to the making of his or her will, and then married in England, revoking the will. In such a case indirectly the change of domicile after the will was executed revokes the will; but it is the special marriage law and not the law of succession of the domicile which produces the effect, so that the exception in the law of succession is only apparent. The law which upholds a will, good by the law of the domicile when made, is of general application, for it has been held by Gorell Barnes, J., that the third section of Lord Kingsdown's Act is not limited in its operation to the wills of British subjects; so that a will made by a Dutch testatrix before her marriage, which remained valid by the Dutch law after marriage, was valid in England, where she and her husband had subsequently acquired a domicile (*In re Groos*, 1904, P. p. 269). The effect of the rule in its extended application is to secure that the intention of the testator, if his will was valid at the time that it was made, should be carried out, provided that his action does not offend against the policy of English law. The English law is thereby assimilated in part to the general practice of nations, which holds a will formally good if made according to the forms of the place of making.

The unwillingness of our Courts to admit retrospective

consequences is further shown by the rule that the law of the domicile which regulates the succession is the law as it stood at the date of the death of the person whose succession is in question. Any subsequent change of law, or penal decree against the deceased's property passed by the Government of the domicile, is disregarded by the English courts in administering the estate in England. (Cf. *Lynch* v. *Government of Paraguay*, L. R. 1871, 2 P. & D. 241; and *Re Aganoor's Trust*, 1895, 64 L. J. Ch. 521.) In the first case, a special law of the Government of the South American State, forfeiting the property of the deceased after his death, was disregarded by the English Court; in the second, the introduction of the Italian Code as the law of Parma in place of the Austrian law, which had held sway when the testatrix made her will and died, was disregarded by the English Court in determining the validity of the will, though the application of the Italian Code was declared to be retrospective by the local legislature.

There is one reported case in which the English Court held that a will, which was good by the law of the deceased's domicile at the time of his death, but was not good by the law of his domicile at the time of making it, was bad (*In the Goods of Stoddard* (31 L. J. p. 95)). But the decision is isolated, and has never been followed; and it is submitted that it is wrong in principle, seeing that a will in English law speaks from the death. It is clearly out of harmony with the spirit of the third section of Lord Kingsdown's Act, so that it is not likely to be treated as authoritative to-day, if the question arose again.

It has been pointed out that, even where foreign countries admit domicile as a basis of the personal law for a foreigner resident within their jurisdiction, their conception of domicile in many cases differs from the English. Thus several countries recognize only a domicile *de jure* as a basis of rights, *i.e.* a domicile which has been expressly authorized by the State; and the tendency has been on the Continent for this State-authorization to become a necessary element of a legal domicile,

which alone can serve as the foundation of the personal law.

Until the middle of last century an Englishman could acquire a domicile in France by residence without such authorization (cf. *Bremer* v. *Freeman, supra*); but to-day the current of authority is against the legal effect of such a domicile. By English law, on the other hand, no authorization is required for a foreigner to acquire an English domicile, nor is the authorization of the State required for an Englishman to acquire a foreign domicile. While more than a change of residence must be proved, our law recognizes the domicile *de facto* as a domicile *de jure*. Questions therefore have arisen as to the domicile of a British subject, when according to the English principle he would be held to be domiciled in a foreign country, but according to the foreign principle he would be held to be still domiciled in England; and also as to the domicile of a foreign subject, who, in the English sense, would be held to keep his domicile of origin, while, in the foreign sense, he would be "domiciled" here. The decisions upon this point leave the matter in some doubt.

It is submitted on general principles that an English Court, in determining whether a domicile has been effected, can apply only the English conception of domicile; but the subject is complicated by the doctrine of Renvoi, which is considered in a later chapter. If the English Courts find that a subject is domiciled in a foreign country, the laws and Courts of which country do not recognize domicile at all as a basis of jurisdiction, the repudiation should be accepted by the English tribunal (cf. *Re Johnson*, L. R. 1903, 1 Ch. 821); but it is not quite the same matter where the courts of the foreign country do accept the principle of domicile as a basis of civil rights, but apply it differently. In the case of *Re Martin: Lonstalan* v. *Lonstalan* (1900, P. (C. A.) at p. 211), there was a question as to the domicile of a French woman who had married a French refugee in this country. Lindley, M.R., dissenting from the majority of the Court of Appeal, held that the domicile of the

husband and therefore of the wife at the time of the marriage was French, and that a will made by the wife before marriage was in consequence revoked. It was represented that, according to the view of French law, the husband would be domiciled in England; but the President in the Probate Court had found that he was domiciled, in the English sense, in France at that time. And in upholding this finding Lindley, M.R. said: "The domicile of the testatrix must be determined by the English Court of Probate according to those legal principles applicable to domicile which are recognized in this country and are part of its law. The preliminary question, by what law the will is to be governed, must depend in an English Court on the view that Court takes of the domicile of the testatrix when she died. If authority for these statements is wanted it will be found in *Bremer* v. *Freeman* (10 Moo. P. C. 306), *Doglioni* v. *Crispin* (L. R. 1 H. L. 301), and *In re Trufort* (36 C. D. 600). In each of these last two cases a foreign court had determined the domicile, and the English Court had also to determine it, and did determine it to be the same as that determined by the foreign court. But, as I understand those cases, the English Court satisfied itself as to the domicile in the English sense of the term, and did not simply adopt the foreign decision. The course universally followed when domicile has to be decided by the court of this country proceeds on the principles to which I have alluded" (page 227).

In a more recent case, however, *Re Bowes: Bates* v. *Wengel* (1907, 22 T. L. R. 711), Mr. Justice Swinfen-Eady applied a different principle to the will of a British subject born in England but living permanently in France, so as to be in fact domiciled there in the English sense. The testator had not acquired a legal domicile in France in the manner prescribed by French law, and the French courts, it was alleged, would have held that his will was governed by English law. Lord Lindley's judgment in *Re Martin* does not seem to have been referred to, but upon the authority of *Re Johnson* the Judge held that both as to construction and administration English

law applied to the will, because the testator had not acquired a legal domicile in France. The effect of the judgments taken together would appear to be that, while the question as to the *acquisition* of the foreign domicile must be settled by the English Courts in accordance with the rules of English law exclusively, the question as to the legal effect of the acquisition of the foreign domicile must be answered solely with regard to the foreign law, which may not recognize the domicile as affecting the personal law. If this reasoning is correct, a different standard again is set up for determining the domicile of a British subject resident abroad, and a foreign subject resident here. For the latter the English law alone is considered; for the former, the result depends on the combined effect of the English and the foreign law. The decision may be supported as an extended application of the Renvoi doctrine, which modifies the strict law. If it is followed, the result will be that where the law of the foreign domicile (in the English sense) would not admit the domicile, but would refer the matter to the national law of the deceased, the English courts will apply the English law of succession.

Oriental Domicile.

An exception to the ordinary rules of domicile is provided by the law as to the acquisition of domicile by a British subject in Oriental countries. It has been mentioned that in the time of the Western Roman Empire and in the period which followed its break-up, a man was regarded as carrying with him wherever he went the personal law of the nationality or civil society to which he belonged by birth; and this law determined the system of his succession. In the eighteenth century, however, the rule was established in most of the European countries that the personal law is dependent upon the domicile; and domicile connoted permanent residence in a particular country. Although the definition of a personal law differs considerably in various Christian countries, still its basis and

its conception of the family have everywhere much in common. Hence it was reasonable to assume that, in moving his permanent home from one Christian country to another, the individual subjected himself to a new system of law, and desired his whole personal succession, whatever its situation, to be regulated by that law.

But where residence has been taken up in an Oriental and non-Christian country, the position is altogether dissimilar. The European finds himself in an environment where the fundamental ideas of society are different from his own, and where also there are groups of different races, nationalities, and religions living together under one sovereign sway. The position is, in fact, more analogous to that in the Roman Empire than to that in countries of modern civilization; and the Roman doctrine of a portable personal law has been applied to it, at first in rather a loose way, but of recent years more scientifically. Towards the end of the eighteenth century, when questions first began to come before the British courts as to the successions of Englishmen and Scotchmen who had died while out in service in India, it was held that in such cases the deceased had not obtained an ordinary Indian domicile so as to be subject to native Indian law, but had an Anglo-Indian domicile, *i.e.* that his personal law was that of England, in whatever part of the United Kingdom he had his domicile of origin. Cf. *Bruce* v. *Bruce*, 1790 (2 B. & P. 229); *Munroe* v. *Douglas*, 1820 (5 Madd. 379); *Trotter* v. *Trotter* (3 W. and S. 612). This domicile was not lost by a return to his native country, but adhered till death. The notion of an Anglo-Indian domicile was in fact an intrusion of the idea of a British nationality into our system of Conflict of Laws, and it grew up at the time when the rules of domicile had not been fully worked out.

At this period the doctrine of a domicile of origin was not properly developed; and therefore this idea of a special fixed domicile for East Indian officials prevailed, the domicile chosen being that of the controlling centre of the East India Company. But after the decision in *Udny* v. *Udny* (u.s.), the

exception to the ordinary rule of domicile was done away with. It was declared that an officer who had lived in India most of his life, though still remaining in the service of the Company, might by returning to his native country regain his domicile of origin (*A.-G.* v. *Pottinger*, 1861; 6 H. & N. 733). He could not, however, acquire a domicile of choice in a foreign country, as this would be inconsistent with his duties (*Hodgson* v. *De Beauchesne*, 1857, 12 Moo. P. C. 285). With this reservation, henceforth any officer or civilian in the Indian service, or any British subject who had gone to India for the purpose of carrying on private business, obtained while resident there an Anglo-Indian domicile, which made the English law determine his moveable succession if he died domiciled there; but if he finally left the country, his domicile of origin returned. (Cf. *A.-G.* v. *Fitzgerald*, 25 L. J. Ch. 643, and *Commissioners of Inland Revenue* v. *Gordon's Executors*, 12 Sess. Cas. 657.) Immiscibility of character with the general population excluded the foreign resident from subjection to the personal law of the natives, and he was regarded as a member of a special group subject, by the consent of the local sovereign, to its own legal system. But this imputed domicile only adhered so long as he was permanently resident in the Eastern country.

Reasons of expediency prevent the strict application of the law of the domicile of origin to the personal succession of British subjects dying in India during a temporary sojourn. It might be more in accord with the general law to distribute the personal property of a Scotch merchant dying in India according to the Scottish law; but since the local courts cannot know or easily ascertain the various systems of laws of the domicile of origin, the Anglo-Indian law, which is more ascertainable, is preferred. The artificial rules, however, about the fixity of an Anglo-Indian domicile, so long as a person was in the service of the Company, have been abandoned since the establishment of the Imperial Government in place of the old Company. Cf. *Jopps* v. *Wood* (34 L. J. Ch. 212), and *Wauchope* v. *Wauchope*, 1877 (21 Rettie, p. 945).

In India, then, the domicile which a British subject acquires is not a purely Indian domicile, but a domicile in the local English society which subjects him to the special code of laws governing that society. And wherever European Christian subjects are settled in Oriental non-Christian countries, it is submitted that on principle as well as by special treaty-provisions, the law of the domicile to which he becomes subject is not the ordinary law of the land, but the law governing the special group to which he belongs. The effect of treaty-provisions is illustrated by the decision in *Maltass* v. *Maltass* (1844, 1 Rob. Eccl. 67), where Dr. Lushington had to consider the will of a British subject born and settled all his life in Smyrna, but whose father had a domicile of origin in England. It was urged that the deceased was domiciled in Turkey, and that, as by Turkish law there is no testamentary power, the will was invalid. Under the treaty of the Dardanelles, 1809, however, it was provided that the property of an Englishman dying within the Turkish dominions should be delivered to the person designated in his will; and as the provisions of this treaty were part of the Turkish law, it followed that, even if the domicile of the deceased was held to be Turkish, the will was good. On the other hand, it was suggested that a Christian British subject could not become domiciled in the Turkish Empire, and Dr. Lushington approved this argument without definitely adopting it. Since in either case the will was governed by English law, it was not necessary to determine the question of domicile; and the case is only authority for the proposition that a British subject living permanently in Turkey can make a valid will in the English form, and if he dies intestate, his intestacy, according to the capitulations, is dealt with by the law of England.

In a later decision, however, it has been questioned whether, except in India, a British subject can obtain a legal domicile in an Eastern country of different civilization from ours, which will have the effect of ousting the domicile of origin. Mr. Justice Chitty, in *Re Tootal's Trusts*, 1883 (23 C. D. p. 532), treated Anglo-Indian domicile as entirely anomalous, and held

that an Englishman who was permanently settled at Shanghai and died there, had not and could not have obtained an Anglo-Chinese domicile, so as to exempt his personal estate from the operation of the English Legacy Duty Acts. "There is no authority," he said, "that I am aware of in English law, that an individual can become domiciled as a member of a community which is not the community possessing the supreme or sovereign territorial power." And therefore he held that the jurisdiction which the Emperor of China had permitted the British Crown to exercise over its own subjects in the country could not be considered as the law of a domicile, because the English community in China did not possess the supreme sovereign territorial power. His decision, however, and his reasoning have been challenged by Westlake and Piggott, and have been explicitly repudiated by two American courts; by the United States Court for China in *Re Allen's Will*, 1907 (cf. L. Q. R. No. XCVI. p. 448), and by the supreme court of Maine in *Mather* v. *Cunningham* (Amer. J. I. L. Vol. 4, p. 446). In either case the court held that the domicile of the deceased, living in a country that granted extra territorial privileges, should be determined by the same rules of law that apply to the acquisition of domicile in other countries. But the law to which the domiciled person becomes subject in such a case is the law which the territorial sovereign says is to be applied to the community to which he belongs—*i.e.* in the case of Christian residents from an American or a European country, the law of their nationality. His domicile remains none the less a legal relation between an individual and a particular country, because the law of that particular country applies to his case the personal law of his country of origin. In a sense, this notion of the peculiar Oriental domicile of British and American subjects which attaches to them the law of their native country is an example of the doctrine of Renvoi; and it is submitted that in this, as in other parts of the law, that doctrine should be accepted by the English Courts.

Professor Westlake, Sir Francis Piggott, and the late Professor

Hall are all opposed to the *ratio decidendi* in *Re Tootal's Trusts*, and favour the recognition of an Oriental domicile which may be acquired by British subjects settled permanently in Eastern countries. And it is submitted that the decision of the Privy Council in *Parpano* v. *Happaz*, 1894, A. C. 165, offers some support to this standpoint. In that case it was held that in Cyprus the legitimacy of a Roman Catholic Ottoman subject was to be ascertained by applying the Canon law of the Catholic Church. That is, the title to a succession was determined by the law of a religious group and not by the general law of the domicile in accordance with an ordinance to that effect.

At the same time, it must be pointed out that the Privy Council in the case of *Abdul Messih* v. *Farra* (1888, 13 A. C. 431), declared their complete concurrence in the reasoning by which Mr. Justice Chitty supported his decision in Tootal's case. The question before them was as to the law which governed the succession to a member of the Chaldean Catholic community domiciled in the Ottoman dominions. It was urged for the appellants that, the deceased being a protected subject of Great Britain, the English law applied to his succession; and further, that he had acquired an English or Anglo-Turkish domicile, because he was affiliated to a community of persons under English jurisdiction, "who formed as it were an exterritorial colony of the Crown." The attempt to set up such an original and artificial idea of domicile was naturally rejected by the Court, which pointed out that the idea of a domicile independent of locality and arising simply from membership of a privileged society was not reconcileable with any of the numerous definitions to be found in the books. (See at p. 439.) But in rejecting any extension of the conception contained in Anglo-Indian domicile, they drew a distinction between British possessions governed by English law, and countries where Great Britain has only extraterritorial privileges for her subjects; and they seemed to suggest that in the former an Anglo-Oriental domicile is possible for British subjects by which they are subjected to English law, while in the latter it is impossible.

It is this suggestion which, it is submitted, is erroneous in principle, and has not been followed by the American Courts. If the suggestion is correct, the personal property of a British subject who lives and dies in an Eastern non-British country, though entirely situate in that country, is subject to English legacy duty; and it is submitted that this result is neither necessary nor justifiable, and that the ordinary incidents of domicile can be applied to residence in an Eastern country no less than to residence in a British colony or a foreign country, save only that the law to which permanent residence subjects the foreigner is not the law of the non-Christian population, but that particular law which convention with the sovereign power has established as binding upon the Christian residents. Here, again, a departure from the ordinary principles of domicile may work considerable hardship upon the English settler, who may be subjected to heavy duties by virtue of his fixed domicile of origin. The conflict of the American with the English decisions suggests that the matter has not yet received final judicial determination.

CHAPTER III

REAL AND PERSONAL PROPERTY

As has been seen, when the territorial conception of law was modified in the eighteenth century, the maxim adopted was "*Mobilia sequuntur personam.*" Domicile, according to the Law of Nations, regulated the succession to moveable property alone. And this rule was adopted by England. As regards all property in land or other immoveable property, the *lex loci rei sitae* remains supreme in the English Courts, and does not allow any foreign law to oust its sovereignty. The disposition and devolution of land were felt to be matters which in a peculiar degree concerned the territorial sovereign ; and whereas moveables, from reasons of Comity, were held by a legal fiction to follow the person, pieces of immoveable property belonging to the same testator or intestate in different countries were each, according to doctrines generally accepted, subject to the law of the land in which they were situate, and not to the personal law of their owner. In some foreign countries, indeed, the principle of nationality as the basis of succession has since been so fully accepted, that the national law of the deceased is applied both to immoveables and moveables ; but in Scotland, as well as England and Ireland, the *lex loci rei sitae* is still applied as well to the immoveable property of a British subject abroad as to the immoveable property of any person within the United Kingdom. The law of the domicile, therefore, does not determine the disposition of the whole of the personalty, but only of the moveable part of it. All questions concerning the

property in immoveables, including a person's capacity to bequeath or devise them, or to acquire or to succeed to them, are governed by the *lex situs*, i.e. the law of the place where they are situate, whether the devolution takes place under a will or under any intestacy, and whether the immoveable be, according to English notions, real or personal property. Thus a person who is a minor by the law of his native country may devise land in England if he is of age according to the English law (*In re Hernando*, 27 C. D. 284), while a person who is legitimated by the law of his domicile of origin cannot succeed to English freeholds of his intestate father which he claims by inheritance (*Birtwhistle* v. *Vardill*, 7 Cl. T. F. 895). The English law allows only a person born in lawful wedlock to take freehold estate by inheritance. Conversely, the will of a person domiciled abroad is valid to pass English realty or English property savouring of realty, if it complies with the requirements of English law, though it would be invalid by the law of the domicile (*Este* v. *Smyth*, 18 B. 112). The will of a foreign subject disposing of any immoveable property in England must comply with the forms required by the English Wills Acts, or it will be invalid, and the immoveable property will devolve according to the *lex situs* on an intestacy (*Duncan* v. *Lawson*, 1889, 41 C. D. 394); but by virtue of the Wills Act, 1861 (ss. 1 and 2), a will made by a British subject is valid as to form as regards those immoveables in any part of the United Kingdom which are part of his personal estate, though not made in accordance with the forms required by the *lex situs*. These sections, however, do not apply to the will of a British subject disposing of *real* estate in the United Kingdom, and such a will must still comply with the forms required by the law of the particular country in which the estate is situate. Thus a will of an Englishman disposing of Scotch freehold must be made in the Scotch form, and the will of a Scotchman disposing of English freehold in the English form, or it will be invalid. Many foreign countries, indeed, do not require a will of immoveables any more than a will of moveables to comply

with the form of the *lex situs*; and wills are treated as formally valid if they comply with the requirements of the place of making. The rule *locus regit actum*, in short, is applied to all wills. And recently the Civil Tribunal at Nice has upheld the will of a British subject leaving real estate in the Riviera on trust for certain beneficiaries, though the will was in English form and the testamentary trust is an institution unknown in French law (*Re McCalmont*, Clunet, 1911, p. 278). The Court held that though the English trust was a special juridical institution, it contained nothing contrary to French law, and therefore the disposition was both in substance and in form valid in France. But in an old case in the English Courts arising out of the will of the great Lord Nelson, who attempted to create successive limitations of his Sicilian real estate, by imposing a trust on his brother and the trustees to whom it was devised, it was held that as the *lex loci* only recognized absolute ownership, the brother was absolute owner free from the trusts (*Nelson* v. *Bridport*, 8 B. 547). England is stricter than other countries in requiring compliance with the substantive as well as the formal provisions of English law for wills disposing of English immoveables.

The *lex situs* then governs the devolution not only of all real estate, but of all personal estate which is immoveable. Personal property in English law includes leaseholds and land left in trust for sale; and real estate comprises only things inheritable, *i.e.* which went at common law to the heir, and things specifically recoverable. The artificial and technical division of property made in English law is that all chattels which come to the executor as such are personalty, while things which went at common law to the heir are realty. But the division made in international law is the more natural and logical division between moveables and immoveables; and the law of the deceased's domicile is applied only to the succession to his moveables. Leaseholds or chattel interests in land are clearly not within this category; and therefore there is now no question that a will disposing of them must comply with the

requirements of the *lex loci rei sitae*, and that on an intestacy likewise they pass according to that law. The rule is suggested by the early case of *Coppin* v. *Coppin*, 1725, 2 P. Wms. 291, and it was definitely determined in the case of *Freke* v. *Carbery* (1873, L. R. 16 Eq. 541), where a testator domiciled in Ireland gave an English leasehold to trustees in trust for sale, and directed the proceeds of sale to be held in trust for accumulation, which extended beyond the periods allowed by the Thellusson Act. This Act does not apply to Ireland, and therefore did not affect the general personal estate; but Lord Selborne held that it applied to the English leasehold and the proceeds of the sale thereof, which were governed by the *lex situs*. It was argued for the validity of the testamentary disposition that in *Sill* v. *Worswick*, 1 H. B. 665—a case upon the devolution of a bankrupt's foreign property—Lord Loughborough had said without reservation that personal property is subject to the law which governs the person of the owner; but, as the Lord Chancellor pointed out: "The maxim of the law of the civilized world is, *mobilia sequuntur personam*, and is founded on the nature of things. When moveables are in places other than the home of the person to whom they belong, their accidental *situs* is disregarded, and they are held to go with the person. But land, whether held for a chattel interest or held for a freehold interest, is in nature as a matter of fact immoveable and not moveable. The doctrine is inapplicable to it."

Conversely, it has been held that where a testator domiciled in England made an English will, by which he bequeathed certain leasehold property in the Transvaal to his wife for her widowhood, the Roman-Dutch law applied, and the widow was consequently entitled to enjoy the leaseholds in specie (*In re Moses: Moses* v. *Valentine*, 1908, 2 Ch. 235). The English rule of converting wasting property, established in *Howe* v. *Dartmouth*, did not affect the succession, though the testator's intention was that the whole of his estate should be enjoyed in succession.

A will which is good by the English *lex situs*, though not

by the *lex domicilii*, will operate on the beneficial interest in English leaseholds. The Wills Act is the *lex situs* for England and Ireland, and therefore it has been held that a will validly executed according to that Act, though not valid according to the law of the testator's domicile, will pass Irish leaseholds (*De Fogassieras* v. *Duport*, 11 L. R. Ir. 123). The testator was a French subject domiciled in France, and his will in English form was not admissible to probate in respect of the pure personalty, but administration with the will annexed was granted, limited to chattels real in Ireland. Nor will the English court always accept the decree of the court of the domicile as to the invalidity of a will disposing of English leaseholds, but will determine that question for itself (*Boyne* v. *Colclough*, 24 L. J. Ch. 7). On the other hand, where an English will concerns foreign leaseholds or immoveables, the English court will endeavour to ascertain what are the provisions of the foreign law as to the substance and forms of a testamentary disposition of land in that country.

It is now fairly clear that a will, well executed according to Lord Kingsdown's Act of 1861, will operate to pass the beneficial interest of English leaseholds. Some doubt, however, has been raised on the point. In *Pepin* v. *Bruyère* (1900, 2 Ch. 504; and 1902, 1 Ch. 24), the Court of Appeal, confirming Kekewich, J., held that a will of a Frenchman domiciled in France and valid according to the laws of France, was not effective to pass chattels real in England; because although it was good for probate as regards the general personalty, it did not comply with the *lex situs* as regards the form for a will of immoveables. The effect of Lord Kingsdown's Act was not considered, since that Act concerns only wills made by British subjects, and therefore did not apply directly to the case. But in *Re Grassi* (1905, 1 Ch. 584), it was argued on the basis of the decision that a will of an Italian who had been naturalised in England, admitted to probate as good under Lord Kingsdown's Act, nevertheless did not pass the beneficial interest in English leaseholds. The argument, however, was not accepted.

Lord Kingsdown's Act professed to cover wills of "*personal estate*"; and Buckley, J., held that (1) these words had the same meaning there as in the Wills Act, and therefore extended to leaseholds and other chattels real; and (2) that a will well executed by the Act for the purpose of being admitted, is adequate to dispose of English leaseholds, provided it does not offend against any provisions of the *lex situs*, such as the English law of perpetuities. Previously it had been held without discussion that a will of an Englishman domiciled in Scotland, which was well executed according to the law of Scotland, passed leaseholds in England (*Re Watson*, 1887, W. N. 140). If these decisions are right—and it is submitted that they are—the will of a British subject, good under Lord Kingsdown's Act, will operate to pass leaseholds in the United Kingdom; but the will of a foreign subject, whether domiciled abroad or here, must comply with the requirements of the Wills Act to be effective over immoveables here.

Where there is no will, or the will is invalid as not being made according to English forms, or as offending against the Mortmain Act or other Statute, the immoveable personalty in England or Ireland devolves according to the Statute of Distributions: cf. *Duncan* v. *Lawson* (41 C. D. 394), and *In re Gentili*, 1875 (Ir. L. R. 9 Eq. 541). In the first case, English property belonging to a domiciled Scotchman was bequeathed for charitable purposes; in the second, the owner of Irish leaseholds died domiciled in Italy, without leaving a valid will; and in both cases it was held that the next of kin, according to the English law, were entitled to the succession. The power of an executor, again, in dealing with immoveables depends on the *lex situs*. Thus, though the Scottish law does not allow an executor to deal with leasehold property, the executor of a person who died domiciled in Scotland, when his confirmation has been sealed by the English Court of Probate, may sell and dispose of the testator's leaseholds in England. *Hood* v. *Lord Barrington* (L. R. 6 Eq. 218). The Act 21 & 22 Vict. ch. 56 makes the sealing of such confirmation tantamount to an

English grant of probate; and the rights of an English executor thereupon belong to the Scottish executors in respect of English land.

The question has been raised theoretically, but not yet judicially decided, whether legitimacy for the purpose of succession to terms of years in England is to be determined by the *lex situs*. For pure English personalty, the rule is that a child is legitimate who has been legitimated by the law of the country determining his or her personal status; but for succession to English freeholds it was held in the famous case of *Birtwhistle* v. *Vardill*, 1826 (5 B. & C. 438), that only a child born of the marriage could take the inheritance. It is urged by Westlake (Private International Law, p. 218), that in this case the legitimacy of the heir was not referred to the *lex situs*, but that a special rule of English law applied; and that this rule does not apply to an English term of years, so that the next of kin, legitimated *per subsequens matrimonium* by the law of their domicile at the time of their birth and the subsequent marriage, would be entitled to succeed to English leaseholds in case of an intestacy. The peculiar English laws as to inheritance, which are a relic of the feudal age, apply only to real estate in the strict sense which is claimed by descent; and the spirit of the times is opposed to their extension to estates in land, which do not fall exactly within the category of realty. They have been held not to apply even to a case of testate succession to lands, in which "children" are mentioned *simpliciter*; cf. *In re Grey's Trusts* (1892, 3 Ch. 88), where "children" to whom lands were devised were held to include natural children (*a*).

Where things are ambiguous in their nature, such as fixtures, or the proceeds of real estate, or debts secured on land, if they are at all connected with immoveable property, it belongs to the law of the country in which the property is

(*a*) It is noteworthy that in many American states the status of legitimacy for the succession to real as well as personal estate is determined by the personal law of the successor, and not by the *lex rei sitae*. Cf. Burge, ii. p. 390, and *Miller* v. *Miller*, 1883, 91 N. Y. 315.

situated to determine whether they shall be deemed moveable or immoveable. The proceeds of land in England devised on trust for sale are regarded as immoveable property, and therefore such a devise, with a direction that the proceeds are to be laid out for charitable purposes in Scotland, is bad because violating the English statute against Mortmain (*Curtis* v. *Hutton* (14 Ves. 537)). The Mortmain Act, however, does not extend to Scotland, so that an English will of money to be laid out in the purchase of lands in Scotland, which were to be applied for charitable purposes, was not touched by the Act and was good (*Mackintosh* v. *Townsend*, 6 Ves. 330). The Act affects and restricts on the one hand the disposition of any personalty derived from English land which savours of the realty, and on the other the investment of personalty left by an English will for the purchase of English land. Upon this ground it was held that a bequest by a Scotchman domiciled in England of the residue of real and personal estate, on trust to lay it out in the purchase of lands for a charitable purpose, was void (*A.-G.* v. *Mill*, 1831, 2 Dow. & C. 393). The will was made in England, in English form, and the House of Lords assumed that the trustees were bound to purchase lands in England, to which therefore the Statute applied. But Lord Lyndhurst, L.C., pointed out that, if there had been any evidence in the will that the trustees had an option to purchase lands in Scotland, the gift to charity would have been good.

Subsequently it was held by the Privy Council in *Mayor of Canterbury* v. *Wyburn* (1898, A. C. 89) that a bequest by a domiciled Victorian of money to an English Corporation for the purchase of land for charitable purposes was valid by our law. The *lex situs* was not called into operation at all, since the will was governed entirely by a Victorian law, which admitted the investment of money in land for charitable purposes. The English Mortmain Acts, they held, could only affect gifts of money by English wills, and did not operate to invalidate gifts of money coupled with an obligation to lay

them out on land, if they had their origin in a perfectly valid colonial will. They disposed of the decision in *A.-G.* v. *Mill*, on the ground that there the testator (in spite of the statements in the reported judgment) was domiciled in England, and therefore English law applied to his will. Whether or not he was domiciled in England, it appears that it was agreed on both sides that English law governed the will; and therefore the effect of the combined decisions of the House of Lords and the Privy Council is that a bequest of personalty for investment in English land for a charitable purpose is invalid, if contained in a will governed by the English law, but valid if allowed by the law of the testator's domicile which governs the will.

The case is different where mortgages of real estate in England are devised by the will of a person domiciled abroad for charitable purposes. Here, though the mortgages are subject to redemption according to English law, their devise is tantamount to a disposition of land in England, and is therefore prohibited by the Mortmain Act.

The exact ruling of this proposition was given in a very recent case (*In re Hoyles: Row* v. *Jagg* (Swinfen-Eady, J., 1910, 26 T. L. R. 416), affirmed in the Court of Appeal, 1911, 1 Ch. 179), where the question was as to the validity of a bequest for charitable purposes by the testator who was domiciled in England of certain mortgages of freehold land in Canada. The Mortmain law in Ontario was identical with the English law, and it was admitted that a bequest by a person domiciled in Ontario of a mortgage charged on land in Ontario would have been invalid. But it was argued that the Ontario and the English Mortmain Acts applied only to land in Ontario and England respectively; and consequently the law of the testator's domicile did not invalidate the bequest of land in a foreign country. But Swinfen-Eady, J., and the Master of the Rolls held that the Mortmain law either in the colony or in England would apply directly to the bequest, since dispositions of land held by way of mortgage are as much interests

in lands—for the purpose of excluding the rule "*mobilia sequuntur personam*"—as when the land is held for life or years. They adopted the general rule as stated in Story's Conflict of Laws (ch. 10, sec. 447): "Not only lands and houses, but servitudes and easements, and other charges on land, as mortgages and rents and trust estates, are deemed to be in the sense of law immoveables, and governed by the *lex rei sitae*. These may be deemed universally to partake of the nature of immoveables, or (as the common law phrase is) to savour of the realty."

The Master of the Rolls further attached weight to the argument founded on the policy of the Mortmain Act, 1736, and said that he would hesitate before holding that a domiciled foreigner could bequeath (sc. to charity) mortgages of land in England, though a domiciled Englishman could not do so; and Farwell, L.J., while adopting the reasoning that a mortgage was an immoveable, held further that the division of property into moveable and immoveable is only called into operation when the English Courts have to determine rights between domiciled Englishmen and persons domiciled in countries which do not adopt our division into real and personal property. Where, as in this case, the law is the same in both countries and the mortgaged property savours of the realty in both countries, and the same law applies in both countries, there is no need to make the division at all. He held, too, that the question of whether mortgages in England were to be regarded as immoveable was on grounds of public policy to be determined by the *lex situs* and not by the law of the testator's domicile.

The claim of the *lex situs* to determine the disposition of the proceeds of sale of an immoveable in a foreign country was recognized in *Re Piercy* (1895, 1 Ch. 89). In that case an English testator left certain real estate in Sardinia to trustees on trust for sale and conversion, and to hold the proceeds upon trust for his children for their lives with remainder to their issue. By the Italian law, it was alleged, the children were entitled absolutely to the land; but North, J., found as a fact

that the Italian law "has nothing whatever to do with the proceeds of sale, after the land has been placed outside the scope of the will by a disposition which is valid according to Italian law." As regards a part of the land, however, which had not been sold, he looked to the Italian law to say what was the right to enjoy the land in the meantime, before the sale had actually taken place.

A similar principle was applied in *Du Hourmelin* v. *Sheldon* (1839, 4 My. & Cr. 525), when the Crown was declared to have no title to the proceeds of sale of real estate sold under a devise on trust for sale for the benefit of persons, some of whom were aliens. The English law at the time forbad aliens to hold real estate in England, but the Court held that it did not intend to forfeit a share of money arising out of the sale of land when there had been an absolute conversion. The *lex situs* applied indeed when there was only a partial conversion (*Fourdrin* v. *Gowdey*, 1834, 3 Myl. & K. 383); but where English or foreign land has been actually converted in accordance with the directions of a will, the fund is not regarded any more as land, but as moveable property subject to the personal law of the testator. The practice is that in default of contrary evidence the proceeds of the sale of foreign land rank as moveables (*Beaumont* v. *Oliveira*, L. R. 6 Eq. 538).

In accordance with the principle that it is the law of the testator's domicile and not the *lex situs* which determines the nature and disposition of such a bequest after conversion, it was held in *Skottowe* v. *Young*, 1871 (L. R. 11 Eq. 474), that the proceeds of sale of land in England, devised by a British subject domiciled in France on trust to sell and pay the proceeds to his daughters (who were legitimated by French law *per subsequens matrimonium*), were liable to a legacy duty at the rate of one per cent., *i.e.* the lower rate charged on legacies to children of the testator. The French law determined the character of the daughters to be legitimate: and the English law, which would have held them to be illegitimate, did not apply to the subject of the gift. But where natural

children were allowed by the law of the deceased's domicile to succeed as *heredes ab intestato*, but were not legitimated by that law, they were treated as strangers in blood in respect of succession to the proceeds of real estate in England (*Atkinson* v. *Anderson*, 21 C. D. p. 100). Again, upon the ground that the *lex situs* determines the character of proceeds of the sale of land, Kekewich, J. held in *Re Harman* (1894, 3 Ch. 607) that a general bequest in a French will made by an English lady domiciled in France, and having a general power of appointment, operated to dispose of a sum of stock which represented a share of proceeds of real estate in England, though the share was liable to be reinvested in land. The judge, rather straining the law, declared that the stock was personal estate by English law, and therefore that the general bequest was good as an appointment by the provisions of the Wills Act. If it had borne the character of real estate, the French will would not have been good to dispose of it, since the provisions of the Wills Act would not apply to a French will purporting to execute an appointment of English real estate.

It is still a matter of some doubt whether the construction of a will of immoveables is governed by the *lex situs* or by the *lex domicilii*. In two old cases, *Lushington* v. *Sewell*, 1827 (1 Sim. 435), and *Stewart* v. *Garnett*, 1830 (2 Sim. 398), the devise of an estate was held, according to the rule of the *lex situs*, to include slaves and cattle necessary to the enjoyment of the estate. On the other hand, in some cases of the eighteenth century (when Irish currency was different from the English), and in one case of a more recent period, money charged by a will on real estate was held to be payable in the currency of the testator's domicile (*Waller* v. *Brightwell* (2 Wms. 88); *Saunders* v. *Drake*, 1742 (2 Atk. 468); *Lansdowne* v. *Lansdowne* (2 Bl. 60)). Yet more recently the rate of interest on money charged on land was regulated by the *lex situs* (*Balfour* v. *Cooper* (23 C. D. 472)). The uncertainty that exists is unfortunate; and considerations are advanced in a subsequent chapter for applying generally the rules of the law of the

domicile to the construction of a will dealing with both real and personal property.

The *lex situs* more clearly determines the burden which can be thrown upon immoveables by the will of a testator domiciled outside the country in which they are situate, and likewise the disposition of a security on immoveables for a debt which is also personally due. Thus, indirectly, it can affect the succession to personal property, since it may reduce the amount of personalty which a testator intends to leave, by throwing upon it burdens from which he desired to exonerate it, or *vice versâ*. The reason in either case for its interference is that the territorial law is primarily concerned with the succession to land, and must be allowed to fix the conditions attaching to it. Several cases illustrating this interference of the *lex situs* in questions of succession have arisen in connection with estates of Scotch and English testators having property in both countries. Thus in *Harrison* v. *Harrison*, 1873 (L. R. 8 Ch. App. p. 432), it was held that where a testator domiciled in England left a will which purported but was ineffective to pass real estate in Scotland, and these estates consequently descended to the Scottish heir, the liability of the estates to the payment of debts as between the heir and the pecuniary legatee must be determined by the law of Scotland and not by the English law, under which the general estate was being administered. As the Scottish law threw the general debts primarily upon the personal estate, there could be no marshalling in the English court against the Scottish heir, and no part of the general costs of the suit could be thrown on the Scotch estates. And in *Jerningham* v. *Herbert*, 1829 (4 Russ. 388), it was held that a Scottish heritable bond (*i.e.* a bond secured on land), though it contained also a personal obligation to pay the debt, did not pass by an English will, but descended to the testator's heir-at-law, because it was regarded as a right to a part of the land on which it was charged, and therefore a disposition of it must comply with the forms and conditions of the *lex rei sitae*. Similarly, when the *debtor* in such a case is domiciled in England,

his Scottish heir cannot claim exoneration for the debt out of the deceased's personal estate (*Drummond* v. *Drummond*, 1799 (6 Bro. P. C. 601).

Where the personal estate is administered in one country and the real estate is situate in another, a question may arise upon the right of the heir of the real estate to obtain relief against the personal estate, when he has paid moveable debts which by the *lex rei sitae* are primarily chargeable upon the personal estate. The *lex situs* makes the heir in such a case a creditor upon the personal estate distributable according to the *lex domicilii*, but unless the latter law accepts the same principle of administration, the claim cannot always be made effective.

Where, however, the law of the domicile would grant relief in such a case, but the *lex situs* does not give the heir the right to proceed against the personal estate, the real estate has to bear the liability. Within the British Empire the directions of the *lex situs* are followed. Accordingly it was held in the *Earl of Winchelsea* v. *Garetty*, 1838 (2 Keen, 293), that the heir to Scotch real estate who had paid moveable debts could make his claim for relief against the personal estate available in England, where the personal estate was being administered, that estate being the primary fund for the payment of all debts. But as to the heritable debts, in respect of which there was by Scotch law no such right of relief, he was not entitled to the benefit of the English law of administration (cf. *Elliott* v. *Minto*, 1821, 6 Madd. 16). And in a very old case it was declared that where the heir paid debts out of land coming to him in a foreign country in which the deceased was domiciled, but by the law of that country he had the right to be repaid out of the deceased's moveables, he could have recourse against the English personalty (Anon., 1723, 9 Mod. 66), which is apparently the same case as *Bowerman* v. *Reeve*, 1721, Prec. Ch. 5). In this way the rule that the method of paying the debts of the deceased's estate is determined by the *lex fori* (see next chapter) is limited and modified by the *lex situs*. The *lex situs* likewise interferes with the application of the law of the domicile in

respect of the conditions which are required to establish a case of election against the heir to immoveables not validly disposed of by will; its effect in this direction is investigated in a later chapter (*a*).

It may be doubted whether it is necessary to preserve to-day, when land is more easily disposed of, and therefore more assimilated to the conditions of personal property than was formerly the case, those interferences with the testator's intention, which the introduction of the *lex situs* into cases of succession frequently involves. The main object of the rules of the Conflict of Laws in regard to succession is to secure the treatment of the estate as a universality, and that object is liable to be defeated if one law applies to the moveable, and another to the immoveable, property. In Italy the national law of the deceased is already held to apply to the whole estate; and in the draft international convention on the law of succession, drawn up at the Hague in 1904, it was provided that this should be the general rule. An exception would be made for cases where a disposition of land conflicts with some principle of public policy of the country in which the land is situate. But where no such principle is involved, it is submitted that it would be juster and more reasonable to allow the law of the general succession to have sway, whether that be the law of the testator's domicile or his nationality. Savigny pleaded for a single rule of succession seventy years ago, and pointed out that, in the case of intestate succession especially, it is unnatural to suppose that the deceased intended a different system of law to apply to different parts of his estate. More recently Professor Dicey has commented upon the decreasing influence of the *lex situs* in the English law of succession (Conflict of Laws, 2nd Edition, p. 728). So far as the influence remains, it tends to introduce anomalies into the distribution of estates, which mar the unity of the principle of succession, and defeat the volition of the deceased, that it is the aim of the science of private international law to support.

(*a*) See Chapter V. p. 111.

CHAPTER IV

ADMINISTRATION OF THE ESTATE

SUCCESSION in English law comprises two separate and distinct stages which are subject to different principles of law. In the first place the estate of the deceased has to be administered, *i.e.* the right of succession must be legally approved, the debts of the deceased paid, and the fiscal duties charged upon the estate must be satisfied. When this has been done, the surplus of the property is distributed among the successors, according to the directions of the deceased, if he left a will, and according to the law governing his intestacy if he left no will. There is no beneficial succession in English law until the personal estate has been administered, because an intermediate step is interposed between decease and distribution: viz. administration. For centuries the law has required that the administration of the estates of deceased persons should be carried out under the supervision of the Court. Originally the ecclesiastical tribunals had jurisdiction; but now a special division of the High Court of Justice deals with all matters of proving wills and the grant of administration, while the actual process of administering and the determination of questions of construction are, where necessary, controlled by the Chancery Courts. Till the grant of probate or administration has been obtained, and, if the estate is being administered under the supervision of the Court, till the administration is complete, the successors can receive no benefit. Upon the death of an intestate, the personal estate vests in the Judge of the Court (Court of Probate Act, 1858,

21 & 22 Vict. ch. 95); and upon the death of a person testate it devolves on the executors appointed by the will, but they cannot deal with the property till they have obtained probate. If no executors are appointed or there is no will, a grant of administration must be obtained from the Court by the nearest of kin or the person most interested in the estate; and when the grant has been made, the estate devolves upon the administrator appointed by the Court, whose primary duty is to liquidate the deceased's true succession, to realize his assets, and to pay his debts.

If the deceased person had property abroad, and left an heir to, or appointed an executor of, his whole estate in a foreign country, no personal assets situate in England can be touched, whatever the deceased's domicile may have been, till the right to administer them has been obtained from the English Court. Nor does the law of the deceased's domicile affect the powers of the English Court in granting or supervising administration. The administration of the English personal estate takes place entirely according to the English law. The maxim "*mobilia sequuntur personam*" has no application in the law as to granting administration. It is the actual situation of the moveables when they are concrete chattels, and the place where they can be sued for or recovered when they are choses in action, that is the basis of jurisdiction. The rules governing the *situs* of choses in action are dealt with in a subsequent chapter upon Death Duties (*a*); and as the principles upon which an English administration is required are nearly coincident with those which fixed the liability of the personal estate to the old Probate Duty, it is in the cases dealing with the Duty that they are to be sought, because it is with reference to the payment of Death Duties that the questions have most often been raised and decided.

The *lex fori*, and, in the case of immoveables, the *lex situs*, govern the administration till it has been completed, and the balance of the estate is available for distribution. Then, and

(*a*) See Chapter VII. p. 151.

then only, the law of the domicile comes into operation. However small, then, the property here may be, the person who claims to be successor must obtain a grant of administration, and prove his right of succession, before he obtains any title to the personal assets of the deceased. The property need only be the clothes in which the deceased died or letters necessary to prove a debt recoverable abroad. But, provided there is some concrete thing locally situate in England, the English Court has jurisdiction.

The principle that the English Courts possess a competent and exclusive jurisdiction in all matters of administration of personal property situate in England was laid down as early as 1735 in the case of *Tourton* v. *Flower* (3 P. W. 369); it has often been affirmed, and seldom, if ever, infringed. Thus in *Price* v. *Dewhurst*, 1838 (4 My. & Cr.), Lord Cottenham said (at p. 81): "This Court knows nothing of any will of personalty, except such as the Ecclesiastical Court has by the probate adjudged to be the last will." Again in *Whyte* v. *Rose* (1842, 3 Q. B. 493), Tindal, C.J., giving the decision of the Exchequer, said that an administrator who had obtained an English grant might bring an action in England on account of any personal property of the deceased which was alleged to be in Ireland: "It is also well established that, in order to sue in any Court of this country in respect of the personal right of property of an intestate, the plaintiff must appear to have obtained letters of administration in the proper spiritual courts of this country: so that if the plaintiff had in the first instance taken out administration in the proper spiritual Court in Ireland for the purpose of administering the bond which was found in Ireland, he could not have sued in England upon such letters of administration, but must also have taken out administration in England from the proper spiritual Court there."

When, however, the foreign administrator has reduced into possession abroad the property locally situate in England, an English grant is not necessary as the basis of an action to recover it. Thus where a Scotch administrator had obtained

a judgment against an English debtor, and where a French widow had obtained a judgment in France against an English debtor of her husband, it was held that the representative of the deceased could sue here without a fresh grant of administration. Cf. *In re Macnichol* (L. R. 19 Eq. 81); *Vauquelin* v. *Bouard* (15 C. B. (N. S.) 341). On the other hand, no payment can be safely made by an English debtor to a foreign executor, till an English grant has been obtained (*Re Fernandes*, L. R. 5 Ch. 314). In that case a Chartered Bank whose head office was in England was being wound up, and it was held that the official liquidator could not remit to the personal representative of a creditor who had died domiciled in India any dividend on account of the debt without the production of an English Probate. Cf., too, *Lasseur* v. *Tyrconnell* (10 B. 28). But where the executor appointed by the Court of the domicile has obtained probate here, payment to him by a debtor is a good quittance (*Hutchinson & Co.* v. *Aberdeen Banking Co.*, 15 Sh. 1000).

The English law requires that the executor's title should be sanctioned by its court, in order that all property within its jurisdiction should be properly safeguarded. To that end it must be satisfied of the validity of the document under which any succession to property in England is claimed. Hence where an applicant asked for payment out of Court of money to which he was entitled under an appointment by will, made and probated in New Zealand, the Court held that the will must be proved in England before the money could be paid (*Re Vallance*, 24 C. D. 177).

Recently the Privy Council has held that an English Company was bound to obtain probate or letters of administration in England, before transferring into the names of the executors in their books shares which belonged to a testator who was a foreign subject domiciled in America (*New York Breweries Co.* v. *Attorney-General*, 1899, A. C. 62). On the other hand, if there is no personal property of the deceased situate within the jurisdiction of the English Court, it will

not grant probate or letters of administration to an applicant, simply for the purpose of giving him a title in the country of the domicile (cf. *Jauncey* v. *Seeley*, 1 Vernon, 391; *Re Goods of Fittock*, 32 L. J. Pt. M. 157; and *In the Goods of Tucker*, 3 S. & T. 585). Similarly where the deceased has left two wills, one dealing entirely with the foreign property and the other with the property in England, the English Court will grant probate only of the English will, cf. *Re the Goods of Coode* (L. R. 1 P. & D. 449), where the English judge refused probate of a will disposing of property in Chili; and *Re Goods of Murray*, 1896 (P. 65), where the Court refused to incorporate a will dealing with American property in the probate of a will disposing of English property. But where the English will incorporates the foreign will, the English grant will cover the whole testamentary disposition. Cf. *In Goods of Harris* (L. R. 2 P. & D. 83). (*a*) It is usual not to make a limited grant where the executor can have a full grant; but if the testator intended to deal with separate portions of his property by separate wills, the Court may in its discretion give a limited grant to executors who are entitled to the general grant. Thus where the deceased, who was domiciled in Germany, left a will in English form disposing of English realty exclusively with English executors, and a will in German form with German executors disposing of his personal estate which included English personalty and expressly confirming the English will, the Court on evidence that there were no English debts granted probate of the English will limited to the realty, and made a *coeterorum* grant to the German executors, save and except the realty (*In the Goods of Brentano*, 1911, L. J. p. 272).

By special statutory enactments, probates of wills and letters of administration granted in Scotland and Ireland may

(*a*) It has been stated on the authority of one or two old cases (cf. *Spratt* v. *Harris*, 1833, 4 Hagg. Eccl. 405) that the English Court can grant administration though there are no English assets, if the deceased was domiciled in England. But this doctrine is not consistent with the general principles of administration, and has not been acted upon in any recent case.

be affirmed or resealed by the English Court, and thereupon the executor has all the powers which he would obtain by a fresh grant in England,—and *vice versâ* (20 & 21 Vict. ch. 79; & 21 & 22 Vict. ch. 56). Further, the Colonial Probates Act of 1892 provides for the sealing in the United Kingdom of probate or letters of administration granted by Courts in British possessions, which have made adequate provision for reciprocity, or by British consular Courts in foreign countries, or Colonial protectorates.

Within the Empire, therefore, it is not always necessary to take out a separate grant in respect of the English assets of a deceased person domiciled in another part of the Empire. But, with this reservation, a grant of administration must be obtained from the English Court by the personal representative of the deceased, as a condition of dealing with any of the English assets or assets held to be locally situate in England or suing for debts of the deceased recoverable here.

The one exception to the rule is that where a policy of life-assurance has been effected with any English assurance company by a person who shall die domiciled elsewhere than in the United Kingdom, the production of a grant of representation from a Court in the United Kingdom shall not be necessary to establish the right to receive the money payable in respect of such policy: Revenue Act, 1889 (47 & 48 Vict. ch. 62, s. 11).

Whenever the English grant of administration has been obtained, the English Court has jurisdiction to determine any question not only in the administration of the English assets, but also in the whole succession. Thus it may be called upon, and has power to determine, "whether the alleged will of the deceased is a good testamentary disposition (cf. *Bremer* v. *Freeman*, 1857, 10 Moo. P. C. 306); what is the construction of the will (*Enohin* v. *Wylie*, 10 H. L. C. 1), or who are the persons entitled to succeed to the moveable property of an intestate domiciled abroad (*Doglioni* v. *Crispin*, L. R. 1 H. L. 301)." The jurisdiction, however, is exercised subject to the principle that the *law* of the domicile determines all these

questions of beneficial succession, so that the English Court either follows a decision of the foreign court already given in the same matter, or ascertains what the foreign Court would be likely to hold, and decrees accordingly.

While, too, the English law requires an English grant of administration to be obtained as a condition of the personal representative taking possession of the English assets, yet in practice the English Court regularly pays respect to any pronouncement of the Court of the domicile as to the person to whom the grant is to be made. When the Court of the country of the domicile of the deceased makes a grant to a person who then comes to the English Court, power is generally granted without further consideration to that person to administer the English assets (cf. *Re Hill*, 1876, L. R. 2 P. & M. 90). But if the person empowered by the Court of the domicile is disqualified from acting by the *lex fori*, another person will be appointed (cf. *In the Goods of H.R.H. the Duchess of Orleans* (1 Sw. & Tr. 453), and *Re Meatyard*, 1903, P. 125). In the first case application was made for a grant of administration to a minor, who was the administrator in France, and the English Court appointed his grandmother, as his next of kin, guardian on his behalf, and granted the administration to her. In the second case the English Court preferred the administrators appointed by the Belgian Court—Belgium being the deceased's domicile—to the executors appointed in a separate will made by the testator for his English property.

When a foreigner dies in England and no person is present at the time of death who is entitled to administer the estate, the Domicile Act of 1861, s. 4, allows letters of administration to be granted to the consul of the deceased's country, which may be limited as the Court thinks fit. Conventions have been made according to the Act with the United States and Japan, providing for the administration by their consuls here and reciprocally for the administration by our consuls of estates of British subjects dying abroad.

The English Court has regard to the law of the deceased's

domicile, in order to determine the authority vested in any one with regard to dealing with the estate, and then to make such a grant to that person as will enable him to perform his duties in this country: cf. *In Goods of Briesemann* (1894, P. 260), where the Court granted administration, for the use and benefit of the executors in Germany, to persons in England appointed by a German will to realize the English property and pay over the proceeds. The Court will not, however, invariably follow the Court of the domicile in the form of the grant to the person appointed by it, where such a grant would be contrary to its own practice: cf. *In re Goods of Cosnahan* (L. R. 1 P. & D. 183), where the Court accepted the finding of the (Manx) Court of the domicile as to the validity of a testamentary document, but gave administration with the will annexed in place of a grant of probate to the executor appointed by the Manx Court, since the document was not regarded as a will by English law.

So, too, the English Court generally accepts the decisions of the Court of the domicile as to the validity of a will, and will not allow it to be litigated here, when the foreign Court has granted probate: cf. *Miller* v. *James* (L. R. 3 P. & D., p. 4). And when the Court of the domicile does not recognize a will, but directs the moveable property of the deceased to be distributed according to the disposition of the members of his family, the English Court grants probate of such disposition and not of the will (*In the Goods of Prince Oldenburg*, 1884, 9 P. D. 234). Again, when the Courts of the domicile do not recognize executors, but make a decree entitling certain persons to administer the estate, administration of the English personal estate will be granted to these persons (*In the Goods of Abdul Hamid Bey*, 1898, 67 L. J. P. 59; and *In the Goods of Dost Khan*, 1880, 6 P. D. 60).

The broad rule upon which the Probate Court acts was laid down by Sir J. P. Wilde in *Re the Goods of Earle*, 1867 (L. R. 1 P. & D. 450): that "The English Court ought to make a grant to the person who has been clothed by the Court of the country of domicile with the power and duty of administering

the estate, no matter who he is, or on what ground he has been clothed with that power." Were it otherwise, endless confusion would be bound to arise in administering an estate, parts of which were scattered in various territorial jurisdictions; and the object of the international comity, which is to secure a unity of succession, would be defeated. In Scotland likewise, the decree of the Court of the domicile in an administrative suit is treated as final (*Marquess of Breadalbane* v. *Marquis of Chandos* (7 L. J. Ch. 28). In exceptional cases, however, the judgment of the Court of the domicile is not followed, where it has been given by interested persons in their own favour, or obtained irregularly (*Price* v. *Dewhurst*, 4 My. & Cr. 78, and *Isherwood* v. *Cheetham*, 31 L. J. P. 99).

The principle of these rules is that the Courts of the domicile of the deceased are the seat of the primary administration of the personal property, and that the administration of the property situate in a country which was not the domicile is auxiliary to the other. And although the administration of the English property is theoretically governed by the English Courts in its entirety, in practice deference is paid to the disposition of the Courts of the domicile, which are regarded as more competent to select the proper person to deal with the whole estate. In the United States, where questions frequently arise in the Courts of the different States upon the probate of foreign wills, the tendency of the Court is not to admit a foreign will to probate before it has been admitted at the domicile of the testator, unless there are special circumstances. In English procedure there is no rule to this effect, but since the administration in the country of the domicile is regarded as primary, the decisions of its tribunals upon any matter concerned with the succession are treated with the fullest respect, and are regularly followed, save where they conflict with one of the principles of our law. The English Court, in making its grant, relies on the document before the foreign Court of the domicile, or a translation of it: so that if the will propounded in the Court of the domicile was a translation of a testator's English will,

the English Court will act upon a translation of that translation, rather than on the original (cf. *In the Goods of Dehais,* 4 S. & T. 13; and *In the Goods of Rule,* 4 P. D. 76). The rule, it may be thought, is rather artificial, but it is designed to secure the single system of succession, at which the procedure of the auxiliary administration is aimed.

The powers of the English executor or the administrator appointed in England extend over the personal property of the deceased within the jurisdiction of the Court at the date of the grant, and over assets which come within its jurisdiction, without having been reduced into possession by lawful authority since the death: *Whyte* v. *Rose,* 1841 (3 Q. B. 506). The property need not be locally situate in this country to bring it within the English grant, but the administrator can sue in relation to it, provided that the person accountable is within the jurisdiction. In some old cases indeed of the eighteenth century, it is suggested that the English administrator could empower an agent by a mere letter of attorney to collect the assets of the deceased in a foreign jurisdiction (cf. *Atkins* v. *Smith,* 1740, 2 Atkin, 63); and that the grant of probate by the English Court bound the Judge in a Colonial Court to grant administration to the same person, even though the deceased was domiciled in the colony [cf. *Burns* v. *Cole,* 1762 (2 Ambl. Ch. 415), and the cases cited in that report]. But these decisions were given at a time when there was some question as to the control by the English ecclesiastical court over the "settlements and plantations," and they are not consistent with the modern doctrine, by which Colonial Courts are regarded as on an equality with English, nor with the practice of the English Courts already mentioned, by which they reserve the right not to follow the foreign grant of administration where they think fit. It is very unlikely that the English Court would make any attempt to-day to uphold the old doctrine; and where property of the deceased has been reduced into possession in a foreign jurisdiction by the foreign administrator, the English grant would certainly not operate upon it,

even though it were subsequently brought within the English jurisdiction (*Currie* v. *Bircham*, 1822, 1 D. & R. 38). Nor would it be maintained to-day that the foreign Court is bound to clothe the English administrator with the powers of the personal representative of the deceased in its country, even when the deceased was domiciled here.

All that can be said is that our Court would properly expect reciprocal treatment from the foreign Court; and that probably the primary English grant would be followed in the auxiliary foreign administration except in special cases, just as a primary foreign grant is regularly followed in an English auxiliary administration. "The grant of probate," it has been declared, "does not, of its own force, carry the power of dealing with the goods beyond the jurisdiction of the Court which grants it, though that may be the Court of the testator's domicile. At most it gives the executor a generally recognized claim to be appointed by the foreign country or jurisdiction. Even that recognition is not necessarily extended to all legal personal representatives, as when a creditor gets letters of administration in the Court of the domicile" (*Blackwood* v. *Reg.*, 8 A. C. 82) (*a*).

Liability of the Administrator.

Each administrator is primarily liable in his own jurisdiction. A foreign administrator, however, who sends or brings to this country personal assets of the deceased, for which he has not accounted in his own jurisdiction, may be sued by a creditor here in an action for their judicial administration, an English administrator being made party to the action (cf. *Lowe* v.

(*a*) It has been held in France that if a foreign decree appointing an administrator to wind up an estate is produced as evidence to prove the legal capacity of the applicant and not with a view to exercise any rights against any person, it may be admitted without having first been rendered executory by a French Court; but if an English administrator or executor desires to claim the estate of a deceased person in France he must first apply to the French Courts to render the English probate or letters of administration executory in France. Clunet, 1892, p. 684, and 1898, p. 728.

Fairlie, and *Logan* v. *Fairlie* (2 Madd. 101; and 2 S. & T. 284). As regards debts, the rule is that they may be sued for in the jurisdiction where the deceased could have sued for them; and neither the domicile of the deceased nor the grant of administration affect that right. But only the executor or the administrator, who is within the jurisdiction in which the deceased person could have recovered the chose in action, can sue. The rules or the *situs* of choses in action are given in Chapter VII. more fully. The debts due on negotiable instruments and bonds payable to bearer are treated rather as corporeal chattels than ordinary debts; and they pass to the administrator, who first reduces them into possession within the country in which he has obtained the grant: *A.-G.* v. *Bouwens*, 1838 (4 M. & W. 171). Lord Abinger's judgment in this case summarises concisely the rules as to the locality of personal property. "Judgment debts are assets for the purposes of jurisdiction where the judgment is recorded . . . specialty debts where the instrument happens to be, and simple contract debts where the debtor resides at the testator's death; and as bills of exchange and promissory notes do not alter the nature of the simple contract debts, but are merely evidences of title, the debts due on these instruments are assets where the debtor lived and not where the instrument was found."

The English administrator is liable to account to the creditors of the deceased for all the assets he has received, so that he cannot distribute them till the debts have been paid (*Preston* v. *Melville*, 8 Cl. & F. 1). And he is liable to account to creditors for any assets which he has reduced into possession abroad, without there obtaining a grant (*Stirling-Maxwell* v. *Cartwright*, 1879, 11 C. D. 522, following a very old case reported in Coke, ch. 46 b; *Dowdale's Case*, 1604). Moreover, while he is generally circumscribed in regard to the assets which he gets in, the English Administrator is bound to apply the assets in his possession in paying all the debts of the deceased upon which a claim is made against him, whether they were incurred to creditors within the jurisdiction or without it;

and to pay them in the order of priority which is prescribed for the payment of debts by the law of the country in which he received his grant. This rule has been definitely laid down for England in the case of *Re Kloebe*, 1884 (28 C. D. 95). The deceased was domiciled in Greece, but carried on business in England in partnership, and there were partnership debts due both to English creditors and, to a larger amount, to foreign creditors. It was urged that the English administrator should pay only creditors in this country, and hand over the balance, if any, to the principal administrator in the country of the deceased's domicile; and some authority was quoted in favour of this proposition: *Cook* v. *Gregson* (2 Drew, 286), and *Blackwood* v. *The Queen* (8 App. Case 72). Moreover, in one reported case (*Wilson* v. *Dunsaney* (18 B. 293)), Romilly, M.R., laid down the rule that "the personal assets have to be administered on the principle of the law of the domicile of the person whose estate is being administered;" and, therefore, the priorities of the creditors would be determined by that law. But Pearson, J., doubted this authority, and held that the true principle was that the *lex fori* was to be applied to the administration in its entirety, without introducing any distinction as to the nationality of creditors.

When, however, foreign assets are being administered in England through the submission of a foreign administrator, it seems that the English Court will apply them as the foreign Court's representative would have done, and will not deprive the foreign creditors of any priorities which they would have enjoyed, if the assets had been administered where they were reduced into possession (cf. *Cook* v. *Gregson*, 1854, 2 Drew. 286). This limitation of the sway of the *lex fori* is clearly in accordance with equity.

In accordance, too, with its general predominance in all matters concerning landed property, the *lex situs* prevails over the *lex fori* to determine the order of priority of creditors against assets which are derived from real estate. Thus, in *Hanson* v. *Walker*, 1829, 7 L. J. Ch. 135, the produce of foreign land

belonging to a testator domiciled in England, and whose estate was being wholly administered here, was applied in the order of priority among creditors prescribed by the *lex situs*. The supremacy, however, of the *lex fori* in the administration of *moveable* assets of the deceased in England is now unquestioned.

The principle that the priority of creditors is a question for the *lex fori* was again applied by Romer, J., in *Re Doetsch* (1896, 2 Ch. 836), where he was dealing with the claims of creditors of a firm carrying on business in Spain against the executor of a member of the firm. It was pleaded in defence that the rights of the parties were governed by Spanish law, by which creditors were not entitled to proceed against the separate estate of a deceased partner till they had exhausted the firm's property. But the Judge held that the plea was bad: "English assets," he said, "have to be distributed according to the English law, according to priorities recognized by Courts in this country, according to the rules of procedure and course of distribution adopted here."

The principle is based upon a high standard of justice; and it is preserved from any unfairness by the reservation that, if in any case foreign creditors have a preference over English in the administration in their own country, the Court here would be astute to equalize the payments, and take care that no foreign creditors should come in and receive anything, till the English creditors had been paid a proportionate amount (cf. *In re Kloebe*, u. s.). The rule is the same in the distribution of assets under bankruptcy (cf. *Ex. p. Melburn*, 6 Ch. 64); but it has been objected (cf. *Piggott, op. cit.*, p. 409 ff.) that it involves an unnecessary and unreasonable derogation from the general principle that successions are governed by the law of the deceased's domicile. According to those who put forward this objection, the rights of creditors would seem to be included in the succession. But this, it is submitted, involves a confusion between succession used simply, and succession in the sense that it bears for the purpose of the rule of international law, *i.e.* beneficial succession.

It is the beneficial succession only which is governed by the law of the deceased's domicile. The whole process of administration is governed by the *lex fori;* and it is reasonable that questions as to the payment of creditors should be determined according to that law as well as matters concerned with the collection of the estate. If the English *lex fori* shows greater consideration to creditors than the *lex domicilii*, the English standard should prevail, for it is a matter of justice rather than of beneficial right, which is in issue; and while the territorial law may properly give way to the personal law upon points of beneficial succession, it would be derogatory to its sway if it did not give equal protection to all persons claiming rights against property within the jurisdiction, without having regard either to the different rules applied in administering another part of the estate, or to the national character of the claimants. In administering estates the law is impersonal and concerned only with the property, and the adjustment of claims to or against property.

The consideration of the effect of the fiscal provisions of the *lex situs* upon succession is reserved for separate treatment (*a*).

As regards the collection of the deceased's estate, the powers and liabilities of the English administrators are limited to the assets of the deceased within the English jurisdiction; but as regards the disposition of the funds in their hands, since expressly or impliedly the English administrators are trustees of the deceased's estate for the beneficiaries, the scope of the English administration is enlarged. The English Chancery Court has always exercised a wide jurisdiction *in personam* to compel trustees within the jurisdiction to administer the estate in their hands, wherever its situation, according to the trusts formulated by the deceased. The jurisdiction applies whether the trusts are express or implied; and the beneficiaries may pursue their action for administration in whatever country the trustees reside. If the deceased was domiciled within the jurisdiction, the administration action may be proceeded with

(*a*) See Chapter VII.

here, even though the personal representative is abroad; since the Court in such a case allows service out of the jurisdiction (cf. R. S. C. Order XI. r. 1).

Here, again, as in the case of the payment of debts upon the estate, no question of determining the beneficial succession is involved, but rather a question of enforcing the rights of a person over property within the jurisdiction. The *lex fori*, therefore, applies its procedure, and exercises plenary powers over the administration of the estate, without regard to the law of the deceased's domicile. Whenever, further, an English trust fund is being administered by an English Court, whatever be the domicile of the beneficiary, the English Court will regulate the rights of the claimants to the fund by English law. Thus in *Kirby* v. *Selwyn* (1905, 2 Ch. 117) a legatee under an English will, domiciled in New York, assigned to his wife absolutely his reversionary interest under the will. Subsequently he assigned the same interest by way of mortgage to the plaintiff, who gave notice of the assignment to the trustees of the will. The wife did not give notice till later, but according to the law of her domicile notice was not necessary to complete this assignment of a reversionary interest in personalty. It was held, however, that the English law as to priorities applied, and that accordingly the plaintiff was entitled to priority by virtue of the notice he had given to the trustees.

Where, however, there is a contract, *e.g.* a marriage settlement, governing the disposition of personal property, the English Court, in administering the funds in the hands of the English trustees, will enforce the provisions in the contract according to the proper law of the contract, unless there are provisions in it contrary to public order and good morals. And it was held by the Court of Appeal (diss. Stirling, L.J.), in *Re Fitzgerald* (1904, 1 Ch. 573) (*a*), that a provision in a Scottish marriage contract to pay the income of the settled funds to the surviving husband during his life, so that such payment should be strictly alimentary and not be assignable, nor

(*a*) See Chapter VI.

liable to arrestment at the instance of the creditors, was valid in England, and could be enforced so as to defeat the rights of an English creditor to whom the husband had mortgaged his life interest. "The question in each case," said Vaughan Williams, "is whether the foreign law or private agreement conflicts with a law in which the public order and good morals are essential enough to call into operation the reservation in favour of stringent domestic policy, which in principle is recognized and insisted upon by all civilized nations" (p. 597). And the majority of the Court held that the English law, which refuses to recognize a restriction upon anticipation by an adult male, was not a matter regarding public order or good morals.

Even when the trust-fund is not English, but the trustees are within the jurisdiction of the English tribunal, the administration of the trust may be controlled by the English Courts, without regard to the domicile of the deceased or of the beneficiaries. This principle was acted upon in the case of *Stirling-Maxwell* v. *Cartwright* (11 C. D. 522) and *Johnstone* v. *Beattie* (10 Cl. & F. 42); and was finally affirmed in the famous Orr-Ewing litigation, which exercised the English and Scotch tribunals for several years (*Orr-Ewing* v. *Orr-Ewing*, 9 A. C. 34; and 10 A. C. 453). The testator there, who was domiciled in Scotland and possessed of a large personal and heritable estate in that country and small personal property in England, by a will in Scotch form appointed several persons to be executors and trustees, some living in England and some in Scotland. An infant legatee, resident in England, brought an action in the Chancery Court here to administer the whole estate; and the trustees—though they submitted to the jurisdiction of the Court—raised the defence that the action ought not to proceed in England, and removed all the English personalty to Scotland before the action came on for trial. In giving the judgment of the House of Lords (in the first appeal), to the effect that the English Court had jurisdiction to administer the trusts of the will as to the whole estate, Lord Selborne pointed out

(L. R. 9 A. C. p. 39), that though succession to the moveable estate of a deceased person is governed by the *lex domicilii*, "that law does not prescribe the forum in which the persons beneficially entitled to the succession may pursue against the trustees in whom the estate is vested their proper remedies." The jurisdiction of the English Chancery Courts was established upon elementary principles. "They have always been accustomed to compel the performance of contracts and trusts as to subjects which were not either locally or *ratione domicilii* within their jurisdiction. . . . The jurisdiction against trustees, which is not excluded *ratione legis rei sitae* as to land, cannot be excluded as to moveables, because the author of the trust may have had a foreign domicile; and for this purpose it makes no difference whether the trust is constituted *inter vivos*, or by a will or *mortis causa* donation."

But before the decision of the House of Lords had been given in the English appeal, some of the residuary legatees commenced another action in Scotland against the trustees, claiming that they were bound to administer the estate in Scotland under the authority and jurisdiction of the Scottish Courts alone; and the Scottish Courts in effect upheld their claim. On a further appeal being taken to the House of Lords from the Scottish Court of Session, it was held that so much of the declaration as affirmed the exclusive competency of the Scottish Courts was not supported by statute nor authority; but that the Scottish Courts had full jurisdiction to sequestrate the estate in Scotland, the trustees being there, and to appoint a judicial factor, because a *primâ facie* case of convenience in favour of a judicial administration in Scotland had been made out. The Scottish judges had favoured the proposition that administration should be regulated by the law of the deceased's domicile, and that the English administration was only responsible for the English assets (see per Lord Fraser at p. 463); and they had found support for their view in the American text-books of Story and Wharton, and the dicta in the English cases of *Preston* v. *Melville* (2 Rob. App. 88), and *Enohin* v.

Wylie (10 H. L. C. 1), besides a number of American and Scotch cases.

Lord Selborne, however, definitely negatived the dicta of Lord Westbury in *Enohin* v. *Wylie;* and he pointed out (at p. 503) that most of the authorities adduced for the respondents referred to the proper consequences and effect of the title and office of personal representative; and further, that administration is used in different senses, so that it was fallacious to mix up questions of distribution of the estate with those of the judicial superintendence of the management of the estate. For the purpose of determining succession to moveable estate, "recourse must be had not always or necessarily to the Courts, but always and necessarily to the law of the domicile. But the succession being once ascertained, the rights resulting therefrom belong to and follow the person of the living successor and not the deceased predecessor" (p. 502).

Where a trust existed, the beneficiaries had the power of enforcing their rights against the personal representatives in their fiduciary position wherever they might be found. In Scottish procedure indeed, the Court of Session is loth to interfere with an administrator *extra curiam,* except for some special cause: the English Chancery Court intervenes more readily; but in either country a right of intervention exists. (See per Lord Watson at p. 535, citing among other cases for the Scotch law, *Ferguson* v. *Douglas Heron & Co.,* 1796, 3 Pat. App.; and *Peters* v. *Martin,* 1825, 4 Ct. Sess. Cases, pp. 107 and 503.) A conflict can obviously arise in administering an estate where the property or the trustees are situate in different countries, and recourse is had to both jurisdictions to secure a general administration under judicial control. But the solution of the conflict may be found in the principle for determining jurisdiction suggested by Lord Watson (at p. 544), that every person beneficially interested ought to seek his remedy in that Court in which it is most for the benefit of the trust and of all concerned that the litigation should be carried on. It may be said that the principle is too vague to provide a criterion, but

Lord Selborne pointed out that the English Court would exercise a discretion in rejecting jurisdiction of the administration of the whole estate where proceedings in the same matter were pending elsewhere; and it may be assumed that in exercising their discretion they would follow Lord Watson's principle. That is to say, they would intervene only in so far as they had power to enforce their judgment, and so far as was necessary to give the suitor his proper redress. If a conflict of jurisdiction does arise between two independent tribunals, then, following another dictum of Lord Watson, the better course for each to pursue is to exercise its own jurisdiction, so far as it availably can (p. 532). The power to enforce its orders is the ultimate test of a Court's effective jurisdiction.

This principle was applied recently in *Re Clinton* (88 L. T. 17), where a British subject domiciled in the Gold Coast Colony died, leaving an interest in certain partnership property there on trust for his children. On an action being brought by his infant children, the English Court held that it had jurisdiction as to the personal property, and as to so much of the realty as was subject to the trust, and that the action must proceed without prejudice to any question relating to the immoveable property, if any, the legal interest in which devolved directly on the testator's heir at law. The difficulty of the English Court exercising jurisdiction when it would be more convenient to leave the matters to the foreign *forum* has been obviated by the Rule of the Supreme Court (O. 55, r. 10), providing that, "It shall not be obligatory on the Court or judge to pronounce or make a judgment or order, whether a summons or otherwise, for the administration of any trust or of the estate of any deceased person if the question between the parties can be properly determined without such judgment or order."

On the other hand, if there is litigation in the administration of an estate pending in England, in which complete relief may be had, the Court of Chancery will usually restrain a party to the suit from instituting proceedings abroad, on the ground that this is a vexatious action (cf. *Hope* v. *Carnegie*, L. R. 1 Ch.

320). In that case a decree having been made in England for the administration of the estate of a testator entitled to real and personal estate both in England and the Netherlands, the Court held that one of the children should be restrained from continuing proceedings which she had instituted in the Netherlands for the administration of both her real and personal estate in that country; though Knight-Bruce, L.J., in the Court of Appeal was of opinion that she should have been left at liberty to carry on the proceedings there as to the real estate, if she could do so without touching the personal estate. Where the English Court, however, cannot fully determine a question arising in the administration of foreign real estate of a testator domiciled here, it will in making a decree give the applicant leave to take proceedings in the Court of the country in which the estate is situate to establish his claim (cf. *Battyhany* v. *Welford* (33 C. D. 628; and 36 C. D. 269)). The Court will interfere also, at the instance of the Attorney-General, to secure personal estate bequeathed by a British subject to a charity whether British or foreign. If the charity is abroad, the English Court cannot see to its administration, but it will see that the money is paid to the right persons, so as to secure the testator's intentions being carried into effect (cf. *Provost of Edinburgh* v. *Aubrey* (Amb. 236), *Attorney-General* v. *Lepine* (2 Swanst. 181), and *Attorney-General* v. *Sturge* (19 B. 597)).

The result of the cases on the English Court's jurisdiction in administration is thus summed up in White and Tudor's Leading Cases, 8th Edit., Vol. I. p. 822: "In an action for administration, so far as necessary for the purpose of administration and payment of creditors, the Court will exercise its jurisdiction *in personam* against executors and trustees within the jurisdiction, so far as regards all property within or out of the jurisdiction which can be made available by the *lex loci*; but where the trust is to be administered out of the jurisdiction, or in the case of land it is situated out of the jurisdiction, the Court will on the ground of convenience allow or direct the trust to be

executed by the Court within whose jurisdiction the property is situate, or the trust is to be administered.

When the estate of the deceased has been liquidated, and no administration action is pending, the administrator of the English personal property of a person domiciled in a foreign country is bound to apply the surplus of the property in his hands according to the law of the deceased's domicile. But for a long time there was a doubt whether it was his duty, if the administration here were ancillary, to remit the balance to the executor or administrator in the *forum* of the primary administration, *i.e.* the country of domicile, or whether he was entitled to apply to the English Court to direct the distribution of the English assets to the beneficiaries, upon its understanding of that law or of the deceased's will.

It is quite clear that the first course is always open to the executor or administrator; and it is stated by Mr. Dicey that it is his only safe course unless he takes the direction of the English Court. Distribution is primarily the concern of the forum of the domicile; and the executors situate within that jurisdiction are therefore the persons who should be responsible for the proper disposition of the beneficial succession: cf. *Eames* v. *Hacon*, 1882 (16 C. D. 409), where Mr. Justice Fry held that the legal personal representative constituted by the Irish Court was *primâ facie* entitled to receive the money belonging to the personal estate of the testator (who was domiciled in Ireland), which represented the clear net receipts obtained in any country wherever it may be, and through the intervention of any letters of administration wheresoever granted. He based his judgment partly upon the observations in *Enohin* v. *Wylie* (1862, 10 H. L. C. 1) of Lord Westbury, who said: "I hold it to be now put beyond all possibility of question that the administration of the personal estate of a deceased person belongs to the Courts of the country where the deceased was domiciled at his death. In short, the Court of the domicile is the *forum concursus*, to which the legatees under the will of a

testator, or the parties entitled to the distribution of the estate of an intestate, are required to resort."

The Lord Chancellor was concerned in the appeal before him with a case where the English Probate Court had ventured to construe a will made by an English subject, domiciled in Russia, differently from the Russian Court; and in repudiating this excessive exercise of jurisdiction, he perhaps went further than the existing state of the law warranted, seeing that in the earlier reported cases of *Weather* v. *St. Giorgio*, 1843 (2 Ha. 624), and *Meiklan* v. *Campbell*, 1857 (24 B. 100), the English Court had favoured the distribution in an auxiliary administration, where there was an action for administration before the Court. Moreover, Lords Cranworth and Chelmsford in their judgments in the case, took a diametrically opposite view upon the right of the English Court, though not the Court of the domicile, to distribute; and as has been noted above, Lord Selborne followed them in the Orr-Ewing case. In rejecting the *dicta* of Lord Westbury, he said that in determining the succession to moveable estate recourse would be had by the English Courts—"not always or necessarily to the Courts, but always and necessarily to the law of the domicile. It has never been held that the *forum* in which such rights may be vindicated depends on the domicile (as distinguished from the place of residence for the time being, which is sometimes inaccurately so denominated) either of the plaintiff or the defendant in any action or suit, and that the domicile of the living man whose rights and liabilities are in question is for that purpose immaterial. I am unable to understand how the place in which those rights are to be protected or those liabilities enforced can necessarily depend upon the domicile of the deceased" (*Ewing* v. *Orr-Ewing*, L. R. 10 A. C. 502).

Mr. Justice Stirling quoted this passage with approval in *Re Trufort*, 1887 (36 C. D. at p. 610), and laid down as the rule to be extracted from the cases that: "although the parties claiming to be entitled to the estate of a deceased person may not be bound to resort to the tribunals of the country in which

the deceased was domiciled; and although the Courts of this country may be called upon to administer the estate of a deceased person domiciled abroad, and in such a case may be bound to ascertain as best they can who, according to the law of the domicile, are entitled to that estate, yet when the title has been adjudicated upon by the Courts of the domicile, such adjudication is binding upon and must be followed by the Courts of this country."

The weight of authority would therefore appear to be in favour of the proposition that where the deceased was domiciled in a foreign country, but there is an administration action pending here, and the Court here is in a position to determine the persons entitled to the beneficial succession either through a foreign judgment, or evidence of the foreign law, or the absence of dispute between the parties, it may direct the distribution of the assets in the hands of the English administrator among the persons so found to be entitled. And this result, it is submitted, is consistent at once with expediency and justice, since it may be a great hardship to compel a legatee or beneficiary resident here to resort to the foreign Court, in order to enforce his rights against the English estate. Nor is it inconsistent with this view that the English Courts will, as has been seen, restrain, if possible, by injunction an action for administration in a foreign country when the deceased was domiciled here, and there is an administration suit pending here (cf. *Hope* v. *Carnegie*, 1866, L. R. 1 Ch. App. 320). For the basis of the action of the Court in such a case is that it would be embarrassing and wasteful to allow two suits to proceed together in respect of the same matter. On the other hand, it supports the right of the Courts here to direct distribution in a case of testamentary succession that they do not reject an application to determine the effect of an intestacy, where the deceased is domiciled abroad (cf. *In re Johnson*, 1903, 1 Ch.). They will determine it indeed according to the law of the domicile, and they will regard any judgment of the Court of domicile as binding, but they accept the jurisdiction. *A*

fortiori, then they should be in a position to act upon the result of their determination and superintend the distribution in all cases of succession, whether intestate or testamentary.

In conclusion, then, it may be said that the *lex fori*, according to the English practice, is supreme in regard to all matters affecting the winding up of the deceased's personal estate within its jurisdiction, down to the point of distribution; and that, while guided by the law of the domicile, the English Court may superintend the disposition of the beneficial succession, either where there is a trust and the trustees are within its jurisdiction, or where proceedings have been taken in this country, and it thinks fit to complete the administration directly.

CHAPTER V

THE EFFECT OF DOMICILE UPON THE DISTRIBUTION OF THE ESTATE

I. *In Cases of Intestacy*

THE general rule for determining the beneficial succession to personal estate is that all questions of testacy or intestacy belong to the law of the deceased's domicile. It is that law which has to determine who are the persons entitled to succeed to his pure personalty, where either he has left no will or other testamentary disposition, or he has left a will which by the law of that country is null and of no effect. As regards his immoveable personal property, it is the *lex situs* which decides the devolution, and it is the same law to which is referred the determination of what is moveable and what is immoveable property.

But as regards both the personal chattels and the choses in action of the deceased, the undoubted Anglo-Saxon doctrine is that the succession is governed exclusively by the law of the actual domicile of the intestate at the time of his death. That law it is which determines whether the testamentary document which may be left by the deceased is valid either (*a*) on account of the capacity of the deceased, or (*b*) on account of the substance or material provisions of the document. If it is not valid either as to the whole or as to part of its dispositions, then there is a total or partial intestacy; and this is regulated by the same law. "It is of no consequence," said Story, "what is the country of the birth of the intestate, or of his former domicile, or what is the actual *situs* of the personal property at the time

of his death. It devolves upon those who are entitled to take it as heirs or distributees according to the law of his actual domicile at the time of his death." Story thus stated the rule as a universal doctrine, but the development of the principle of nationality on the Continent renders it no longer true in this comprehensive sense. Several of the most important European countries now hold that the intestate succession is governed by the law of the deceased's nationality; but wherever the Anglo-Saxon jurisprudence is adopted as the basis of law, the old doctrine prevails.

The rule is so well accepted that it hardly needs illustration; but the case of *Doglioni* v. *Crispin*, 1866 (L. R. 1 E. & I. App. Cases, p. 30) shows the extent to which it is enforced. There the English Court had granted probate of a will purporting to dispose of the deceased's personal property here to his only surviving sister; but on the natural son proving that the deceased had died domiciled in Portugal, that the Portuguese Court had found that he had died intestate, and that his natural son was entitled by the Portuguese law to inherit his father's property, the House of Lords held that the English Court was bound by the judgment of the Court of the domicile. So, too, the English Court followed the judgment of the Court of the domicile that the deceased died intestate in *Moore* v. *Darell* (4 Hagg. 346), and ordered the distribution of his moveable estate accordingly. Where, however, the law of the domicile refers the succession of the deceased intestate to the law of his nationality, a case of *renvoi* arises—as in *Re Johnson*, 1903 (1 Ch. 821), and the effect of this reference is considered later (*a*). Hence, while the moveables of a foreigner domiciled in England are regularly distributed according to the English law of intestacy, there are cases where the moveables of an Englishman domiciled abroad are distributed according to English law.

It is only a particular illustration of the general rule, that the rights of a widow in respect of the moveables of an intestate husband are governed by the law of the domicile of the intestate,

(*a*) See Chapter VIII.

and she cannot take advantage of different statutes in her favour in respect of separate parts of the personalty which are situate in various countries, unless she submits all the property to the control of the law of her domicile. In *Rea* v. *Rea*, 1902 (L. R. 1 I. R. 457), it was held that the widow of an intestate domiciled in Ireland could not claim the charge of £500 given to her by the British Intestates Act of 1890, in addition to her share of the residue, without bringing into account the whole of her husband's personalty, including the proceeds of sale of real estate in Victoria, by the law of which country she was entitled to a charge of £1000, subject to debts, before the general estate was divided. Having taken her widow's portion granted by the law of the domicile, she had to accept its disposition of the whole personal estate of the deceased. (*a*)

Lord Kingsdown's Act, it may be remarked, does not affect at all succession on intestacy: its scope is limited to the effect of wills of personal estate made by British subjects; and therefore, if they die domiciled abroad, all their real estate and any part of their personal property in respect of which there is an intestacy remain subject to the rule of the Common Law, though they have left a will valid by the Act as to the rest of their property. So, too, where an intestate leaves realty in one country and personalty in another, the conditions upon which the heir is to share in the personalty must be prescribed by the law of the testator's domicile alone, without regard to the law of the successor's domicile or the *lex situs* of either the personalty or realty. Thus in *Balfour* v. *Scott* (6 Bro. P. C. 550), it was held that the heir to the Scottish real estate was entitled to take the English intestate's personal estate in England as next of kin without any collation. As there was an intestacy, there could be no question of an election.

Since the law of the deceased's domicile determines succession, it has been urged, and it was for a time indeed held, that it must determine the capacity or status of the person who is to succeed, and therefore that it is by that law that the legitimacy of the

a See Addendum.

successor is judged. The view that the law of the deceased's domicile regulates the legitimacy of a claimant to a share of his estate, whether on intestacy or testacy, was adopted by Jessel, M.R., and also by Lord Justice Lush in an elaborate dissenting judgment in the Court of Appeal in *Re Goodman's Trusts*, 1881 (17 C. D. 266). The question in the case was whether a child, born before wedlock of parents who were at her birth domiciled in Holland, but legitimated according to the Dutch law by the subsequent marriage of her parents in that country, was entitled to a share in the personal estate of an intestate domiciled in England, as one of the next of kin under the Statute of Distributions. The child claiming to be entitled had already been held to have the status of legitimacy for the purpose of succession to personal property of her grandfather, which was administered here. In that case, however, England was not the country of the deceased's domicile, and the question was only whether our Courts recognized a status attributed by the law of the domicile (*Goodman* v. *Goodman*, 1862 (3 Giffard 643)). It was held that they did.

In the later case the further point which had to be determined was whether she could succeed by virtue of English law on an intestacy of her parent who was living here at his death. It was agreed that the Statute of Distributions applied not only to English subjects, but to all persons having a domicile in England. But Jessel, M.R., and Lush, L.J., held that the child was not one of the statutory next of kin, because it was not legitimate by English law. They followed a *dictum* of Wood, V.C., in *Boyes* v. *Bedale* (I. H. & M. 798): "If an intestate dies domiciled in England, the division of the property is governed throughout by English law, and no person could take by representation under that statute, unless legitimate by the law of England." The Vice-Chancellor was dealing there with the word "children" in the will of a domiciled Englishman, and held that it would mean legal children according to the English law, as distinguished from children legitimated by subsequent marriage according to the law of their domicile; and his ruling

upon this point was adopted by Kindersley, V.C., in *In re Wilson's Trusts* (L. R. 1 Eq. 247).

Until the decision of the Court of Appeal, then, in *Re Goodman's Trusts*, the English Courts determined the legitimacy of a claimant to an English succession by the law of the domicile of the deceased, and disregarded the law of the claimant's domicile. But Cotton and James, L.JJ., in that appeal established a different rule which has since been followed: that the legitimacy of persons for the purpose of succession to personal property in England depends upon the law of their domicile of origin. But in the special case of alleged legitimation *per subsequens matrimonium*, only if they became legitimate according to the law of the place of their birth and the place of the subsequent marriage of their parents, are they treated as legitimate by English law. With this special exception, legitimacy depends upon the personal law of the successor, and not on the law of the predecessor. Lord Justice James based this rule on grounds of "international comity and international law," by which in all other civilized communities "the status of a person is to be determined everywhere by the law of the country of his origin, the law under which he was born." This view has subsequently been approved and followed by the English Courts in *Andros* v. *Andros*, 1883 (24 C. D. 237), where the exact contrary of *Boyes* v. *Bedale* was held: and in *Re Groves*, 1887 (40 C. D. p. 216), where the doctrine of legitimation was more exactly defined in the way mentioned. The Court of Appeal ruled that a child cannot be legitimated *per subsequens matrimonium*, unless the father was domiciled in a country whose laws allowed legitimation both at the time of the marriage and at the time of the birth in which it took the potentiality of being legitimated. Further, in *Re Grey's Trusts*, 1892 (3 Ch. 88), the doctrine that legitimacy depends on the personal law of the successor was applied as well to a devise of real estate as a bequest of personal estate. But in *Atkinson* v. *Anderson* (21 C. D. 100), where natural children had been allowed to succeed as *heredes ab intestato* by the law of the

deceased's domicile, but their parents had never been married, it was held that they were strangers in blood in respect of a succession to a fund which represented the proceeds of real estate in England. They were not legitimate by their personal law, but merely had the capacity to succeed, and that capacity did not affect their status in England.

The Scottish law does not apply such a strict rule for the legitimation of children *per subsequens matrimonium*. Provided the domicile of the father remains Scotch, the subsequent marriage of the parents will legitimate a child for all civil purposes in Scotland, though the child was born and the marriage took place in a country, such as England, where such legitimation is not recognized (*The Countess of Dalhousie* v. *M'Douall*, 1840, 7 Cl. & F., p. 817; and *Munro* v. *Munro*, ibid. 842). The English rule, however, still remains as it was before the decision in *Re Goodman*, in regard to cases where the law of the domicile of origin (*e.g.* England) did not permit legitimation *per subsequens matrimonium*. In these cases the subsequent change of domicile by the father of the child to a country which does allow legitimation in this manner is inoperative to remove the bastardy of the child for the purposes of succession according to English law. The law of the domicile of the father attaches to the child at its birth, and if that law treats the child as a bastard, the law of the country where the parents subsequently marry has no effect to alter its status (cf. *Re Wright's Trusts*, 2 K. & J. 596, and *Udny* v. *Udny*, L. R. 1 Sc. & Ir. App. 1).

It is submitted that the English doctrine should be amended, so as to bring it into line with the more liberal views of foreign countries, and to make the status of a person claiming under our law dependent upon the law of his or her domicile in all cases. As it was said in *Udny* v. *Udny*, "A person's civil status ought to be governed universally by one single principle, viz. that of domicile, which is the criterion established by the law for the purpose of determining civil status."

Where the legitimacy of children is dependent upon the

validity of the marriage of their parents, the English law recognizes a marriage which was good by the law of the domicile of both spouses, though it would be a void marriage by the law of England. Thus in *Re Bozzelli's Settlement,* 1902 (1 Ch. 751), the Court held that the children of a marriage between an Englishwoman domiciled in Italy with her deceased husband's brother, also domiciled there, were entitled to take under a will executing an English power of appointment to children because the marriage was valid in Italy. Conversely in *Brook* v. *Brook* (9 H. L. C. 173), where British subjects domiciled in England celebrated a marriage in Denmark valid by Danish, but void by English law, the Court held that it was bad, and that the children were illegitimate (cf. *Sottomayor* v. *De Barros,* 1877 (3 P. D. 1) and *Mette* v. *Mette,* 1859 (1 Sw. and Tr. 416)).

When, however, the marriage takes place in a country which does not enjoy Christian civilization, the marriage though good by the law or customs of the domicile will not be recognized by an English Court, unless it is a marriage in the Christian sense: cf. *Brinkley* v. *A.-G.* (1890, 15 P. D. 76), where marriage with a Japanese wife was held good; and *Bethell* v. *Hildyard,* where a polygamous union in Basutoland was held void (38 C. D. 220).

Where a person dies in England intestate, and without leaving any next of kin, his personal property ordinarily falls to the Crown as *bona vacantia.* There is properly no succession at all in such a case, but the Crown takes by virtue of its prerogative. But if the deceased person was the subject of, or domiciled in, a foreign state, the right of the English Crown to take the moveables within the jurisdiction may be challenged by the representative of the foreign government, who may claim to be entitled by a right of succession, and set up the plea that the intestate's estate devolves according to the law of the domicile.

In several cases during the nineteenth century, where property of an intestate foreigner was left in England without any known next of kin, it was laid down that the Queen's Proctor, as the representative of the Crown, should have administration:

cf. *Aspinall* v. *Queen's Proctor* (2 Curt. 241); and *In the Goods of Wyckoff*, 1862 (3 Sw. and Tr. 20). But recently the beneficial right of the Crown was called into question, in a case where an Austrian subject who was entitled to a fund in Court in England died in Vienna, a bastard, intestate, and without heirs (*In re Barnett's Trusts* (1902, 1 Ch. 847). The Austrian Government after a long interval claimed the fund, on the ground that the vacant personalty of a subject is confiscated to the Imperial fiscus; but Kekewich, J., held that it was not entitled, as the right claimed was not in the nature of a succession, and therefore the rule of International law did not apply. The moveables were *bona vacantia* actually situate within the jurisdiction of the English Crown, and the English Crown was entitled to them, as to any other property in the kingdom having no owner. In an early case indeed (*In the Goods of Beggia*, 1822, 1 Add. 340), the English Court had granted administration of the goods of an intestate official of the Emperor of Morocco to a person nominated by the Emperor, but the principle was not considered; and the authority of the text-writers was against the recognition by the *lex situs* of the caduciary rights of the State of the intestate's domicile. Where there is a right of occupation and confiscation rather than succession, the fiction which declares moveables to be in the place of the deceased's domicile "gives place to the fact." Von Bar however declares that, according to the German law, when a man leaves no next of kin, the State whose subject and citizen he was should be entitled to succeed to him; but he recognizes that the rule is otherwise elsewhere. It is indeed reasonable that where the State claims by confiscation and as "*ultimus heres*," the foreign country should not give priority to its claim; since the reasoning which lies behind the principle that succession to personalty depends on domicile no longer applies.

The justification of that rule is that the expressed or implied wishes of the deceased should be respected, and that the distribution of his property should be according to the law he lived under; but there is no reason to assume a preference on

his part for confiscation by any particular country. As Mr. Justice Kekewich pointed out (at p. 857): "Here I have to deal with a case where there is no distribution at all, and where there is really no person to follow; the deceased person by dying heirless has made the domicile immaterial." This remark, however, should be qualified by the provision that there should in the first place be a reference to the law of the domicile to discover if there is a lapse in the succession. The State which says there is no succession cannot go on to say that it has a right to succeed. But if the State treats the right of the Treasury as a succession, the Court where the personalty is situate should, it is submitted, yield to its claim. Savigny held that the right of the fiscus was a true and real right of succession, and therefore proposed that the domicile of the deceased should determine the State entitled to take his property; and several modern jurists have followed him. Several States also have provided for the question by treaty stipulation. Thus France and Brazil, by the Consular Treaty of 1866, agree that in such cases the whole estate shall devolve upon the State within whose territory the deceased has died, while Italy in treaties with Servia, Roumania, and Brazil agrees that the estate shall be dealt with in the same manner as that of a citizen of the country. Lastly Professor Meili has made the suggestion that there should be a division of heirless estates between the national and domiciliary State, but this is a mere proposal of convenience without legal ground.

II. *Testamentary Succession.*

Where the deceased leaves a will, it is, as stated above, for the law of his domicile to determine whether he had capacity to make the will, and whether there are limits on the right of disposition which he has transgressed. It was originally the law of England, moreover, that it was exclusively for the law of the testator's domicile, at the time of his death, to determine whether the will he left was formally good: if it were not so,

it was invalid to pass his personal property whatever its situation (cf. *Robins* v. *Dolphin* (1 Sw. & Tr. 37)). But Lord Kingsdown's Act of 1861 has introduced large modifications of the rule, which have already been noted and are further considered subsequently. Where, however, Lord Kingsdown's Act does not apply, the rule that a will of personal property must be good in form as well as in substance by the law of the deceased's domicile still prevails in England; and a will which does not comply with these requirements cannot form the basis of succession to personal property. A will of real estate in England made by either a British or a foreign subject, and a will of English chattels real made by a foreign subject, must comply with the forms of English law. Foreign countries have generally applied the rule of "*locus regit actum*" to the execution of wills as well as of other documents, and Great Britain now adopts that rule for the wills of personal estate of British subjects; but it retains the strict inflexible criterion of validity by the law of the domicile for the wills of foreign subjects which come before the Courts, unless, indeed, they have been held good by the Courts of a foreign country. In that case the English Court will accept and apply the foreign decision (cf. *Re Trufort*, 36 C. D.). Otherwise the forms of the testator's domicile must be complied with: cf. *Bloxam* v. *Favre* (9 P. D. 130). But whenever the testamentary document is good by the law of the testator's domicile, either at the time it was made or at the date of death, the English Court will admit it to probate.

Thus, where a person was domiciled in Spain, the English Court held that a will made by his wife under a notarial deed giving her authority so to do was good, since, though repugnant to English notions, it was valid in the country of domicile: *In the Goods of Gutterez* (38 L. J. P. & M. 48). And so again, where full executory powers were given by a Spanish testatrix to her sons, general probate was granted to them by the English Court (*In the Goods of Maraver*, 1 Hagg. Eccl. 498). Conversely where the testator left a will which was bad by the law of his domicile, though well executed according to the English

law (the *lex loci actus*), it was held to be bad as regards his pure personalty and only to pass his immoveables in Ireland (*De Fogassieras* v. *Duport*, 11 Ir. L. R. Ch. 23).

Save in so far as is specified in the next chapter, the law of the domicile decides the material validity of all wills whether of British or foreign subjects. This validity depends partly on the capacity, partly on the dispositions of the testator. The law of the domicile at the time the instrument is made will determine the testamentary capacity of the testator. There is no case which directly affirms the point in relation to succession by will, but the rule is so stated by Story (s. 465) and seems right on principle. Moreover, the case of *Cooper* v. *Cooper*, 1888, L. R. 14 A. C. (which dealt with the capacity of a minor to make a marriage contract), is authority for the general proposition that capacity depends on the law of the domicile at the time of making any legal transaction. In that case it was held that a woman domiciled before marriage in Ireland could not make a marriage contract with a Scotchman renouncing her *Jus relictae:* for, though by Scotch law, which was the law of the matrimonial domicile, she had capacity, by Irish law she had not capacity, and that law prevailed.

It is, however, the law of the testator's domicile at death which determines the limit of his power of disposition, or the validity of the conditions which he attaches to a bequest. Where the law of the domicile confers a right of *legitim* upon the wife or children of the deceased, the testator's will is invalid so far as it derogates from that right, unless special provision was made in the marriage contract by which a complete and irrevocable right is given to one of the spouses (*Thornton* v. *Curling*, 8 Sim. 310; *Hog* v. *Lashley* (6 Bro. P. C. 377): cf. also the Scotch cases, *Kilpatrick* v. *Kilpatrick*, 6 Bro. P. C. 58; *Munro* v. *Douglas*, 5 Mads. 394). Where the law of the domicile (England) held a condition in restraint of marriage attached to a bequest to be invalid, the condition was declared null by the Court in administering the estate of a Scotchman (*Ommaney* v. *Bingham*, 1793, 3 Ves. 202).

Again, if the law of the testator's domicile regards a bequest as invalid, on the ground that it violates one of its laws as to public policy, the bequest will fail, whatever the country of the legatee or the situation of the property bequeathed. Thus a bequest by a testator domiciled in England of £1000 to Jesuit priests in Victoria, to be spent on masses for his soul, was held void as a gift to a superstitious use repugnant to English policy (*Re Elliott, Elliott* v. *Johnson,* 39 W. R. 297). Conversely, where a testator domiciled in Scotland left immoveable property in India, on trust to sell and pay part of the proceeds to Scotch executors for a charitable purpose, though the bequest offended against the Indian law as to gifts for charitable uses, it was held that being valid by Scotch law it was good (*Macdonald* v. *Macdonald,* L. R. 14 Eq. 60).

The *lex situs,* indeed, in general applies, as we have seen, to all dispositions of immoveables; and therefore a devise or bequest of English immoveables for charity which did not comply with the conditions of the Mortmain Acts would be bad, though permitted by the law of the testator's domicile. But the scope of the English Mortmain Acts is limited to land in England, and is not a general law applying to the real property of English subjects all over the world. Hence a devise by an Englishman of land in Sydney for charitable uses was held good, because the *lex situs* permitted it, and the *lex domicilii* did not prohibit it, since the statute did not extend its prohibition outside the British Isles (*Whicker* v. *Hume,* 7 H. L. Cases, 124). The *lex situs* may in a few exceptional cases operate to nullify a disposition of moveables valid by the law of the deceased's domicile, where a will is repugnant to its principles. Thus, in *Bradford* v. *Young,* 1884 (11 R. 1135), the Scottish Court declared a nuncupative will invalid as to Scotch property, though it was allowed by the English law of the domicile, because such a will was repugnant to Scotch law.

While the power of the testator to dispose of personal property is limited by the law of his domicile, the power of the legatee to take is not limited by that law, but by the law

of his own domicile. In either case, capacity depends on the personal law. Hence a legatee domiciled in Germany, it has been held, can give a valid receipt for a legacy bequeathed to him by a testator domiciled in England on obtaining his majority by German law, if that happens at an earlier age than by English law (*Re Hellmann*, 1860, L. R. 2 Eq. 363). It appears from the decision in *Leslie* v. *Baillie* (2 Y. & C. C. C. 91) that a payment made by the executors in good faith to a legatee entitled by the law of the testator's domicile but incapacitated by the operation of the law of the legatee's domicile, will not be annulled. In that case money had been paid to the wife; but as Scotland was the matrimonial domicile and the legacy was left to the wife, it should have been paid to the deceased husband's personal representative, because, by the Scottish law, marriage operated as an assignment of the wife's personal property to her husband.

As in the case of intestate, so also in the case of testamentary, succession, where capacity to succeed depends on the legitimacy of the successor, that character will in England be decided not by the law of the testator's but by the law of the successor's domicile of origin (*In re Grey's Trusts*, 1892, 3 Ch. 88). But where there was a gift in an English will to the "next of kin" of a German lady, it was held that the words "next of kin" must be interpreted not according to the German but according to the English law, and therefore the sisters of the half-blood were entitled to the legacy to the exclusion of nieces and nephews who had a prior claim by German law (*In re Fergusson's Will*, 1902, 1 Ch. 483). The Judge pointed out in his decision that it was a case of construction rather than of status—and construction, as will be shown later, depends upon the law of the deceased's domicile. If there had been any question of status, such as the legitimacy of the children of the legatee, it would have been determined by the German law.

It is, however, not quite consistent with the general principle that the English Courts have ordered the payment

out of a fund in Court to a French subject who had been adjudged by the French Court to be a "prodigal," notwithstanding that he was thereby restrained from receiving or giving a receipt for moveable property and that his "Conseil Judiciaire" opposed the application (*In re Selots' Trust*, 1902, 1 Ch. 488). Farwell, J., based his decision to this effect on the ground that the English law did not recognize, and therefore disregarded, the disqualification of a "prodigal"; and that therefore the status of the applicant was not affected by the French judgment. But it is submitted that the partial limitation of capacity does involve a change of status, and that it is for the personal law to determine the status of a person; and its determination is valid everywhere, unless it is repugnant to the ideas of any foreign country which may then refuse to recognize it. Thus, if a legacy were left to a person who, it was urged, could not receive it on the ground that he was a slave, the English Court would naturally refuse to recognize any such status. But query whether the status of a prodigal is repugnant to English notions any more than a marriage between certain relations, which, though not permitted by our law, is recognized by our Courts when permitted by the law of the parties' domicile? (See above, p. 97.)

The jurisdiction of the law of the domicile over the distribution of the estate and the status of the deceased is so exclusive, that even if the judgment of the foreign Court, being the Court of the domicile, has proceeded on a mistake of English law, or upon an incomplete presentation of the facts, it will be followed by the English Court in administering the personal estate in England. This rule was laid down in the case of *In re Trufort*, 1887 (36 C. D. p. 600), where the English Court held that the finding of the Swiss Court—which by the law of the domicile was the proper *forum* to determine all questions as to the succession—upon the legitimacy of the successor and the status of the deceased was binding, though it was urged that the Swiss Court had based its conclusion of the legitimacy of the plaintiff upon a misunderstanding of the English rules of

evidence, and though facts which had not been placed before the foreign Court, bearing on the question of legitimacy, were adduced before the English Judge. Stirling, J., disregarded these pleas, on the ground that the English Courts do not sit to hear appeals from foreign tribunals; and unless there is something contrary to natural justice or a wilful disregard of the law of nations in the foreign judgment, it is conclusive upon all matters of the personal succession when the law of the testator's domicile has referred to it the administration of the estate. The judgment of the foreign Court is tantamount to a judgment *in rem.* Mr. Justice Stirling followed the principle laid down in *Doglioni* v. *Crispin* (L. R. 1 H. L. 301), that where the claim of the party litigating has been adjudicated upon by the Courts of the domicile, the English Court is bound by their decision: and he extended it only in so far as he accepted as equally binding the decision not of the Courts of the domicile but of the Courts to which the law of the domicile referred the suit. It follows, therefore, that even where the succession of a British subject is concerned, and the Courts of the foreign domicile determine the rights of the successors upon an erroneous interpretation of English law, the English Courts will not allow the case to be re-opened in administering the English assets, but will adopt the foreign decision as to the effect of the English law, unless that decision offends against the first principles of justice.

The law of the testator's domicile likewise determines in general the construction of the will. The basis of the rule doubtless is that the testator is assumed to make his will according to the law of his domicile, and it is therefore reasonable that the interpretation of its terms should depend upon the rules of construction contained in that law. As Lord Lyndhurst said in the appeal of *Trotter* v. *Trotter*, 1829 (4 Bl. N. R. 502), where the question was as to the construction of a will made by a Scottish testator domiciled in England: "There are certain rules of construction adopted in the Courts, and the expressions that are made use of in a will and the

language of a will have frequently reference to those rules of construction; and it would be productive, therefore, of the most mischievous consequences, and in many instances defeat the intention of the testator, if those rules were to be altogether disregarded, and the judges of a foreign Court (which it may be considered as in relation to the will), without reference to the knowledge which it is desirable to obtain of the law of the country in which the will was made, were to interpret the will according to their own rules of construction."

The House of Lords subsequently, in *Enohin* v. *Wylie*, L. R. 10 H. L. 1, declared that the English Chancery Court was not entitled to construe the will of a testator domiciled abroad, when the foreign Court had once construed it. The foreign construction was binding upon it in relation to the English assets. In a recent case dealing with the construction of a will, the Court of Appeal refused to hear the appeal till the question of the testator's domicile was decided, it being in dispute whether that domicile was English or Scotch (*In re Mcfee*, 1910 (Law Journal Newspaper, 739).

Again, where a testator was domiciled in England, but left real and personal estate in Scotland, it was held that the Scotch Court must adopt the English principles of construction in interpreting the documents by which the deceased had disposed of his various properties, in order to determine the right of the devisee of the Scotch real estate to certain sums of money, which had been deposited in the Court in part payment for that real estate (*Yates* v. *Thomson*, 3 Cl. & Fin. 544). At the same time the Scotch Court was not bound in interpreting the will to adopt the English rule of evidence, which makes the probate of the will the exclusive proof of the testator's intention, and refuses to admit the original will itself. "Those principles which regulate the admission of evidence," said Lord Brougham (at p. 587), "are the rules by which the Courts of every country guide themselves in all their enquiries; . . . nor can it make any difference whether the facts concerning which the discussion arises happened at home or abroad; whether they related

to a foreigner domiciled abroad or a native living and dying at home."

The *lex fori*, then, determines the admissibility of evidence, and thus the foreign rules of construction may be considerably modified by the introduction of facts which could not have been brought to the notice of the Court in the domicile. For example, in *Re Scholefield* (1905, 2 Ch. 408), the English Court, refusing to admit as evidence of intention certain unsigned memoranda of a testatrix domiciled in France, held that a power of appointment had not been executed, though it was declared that by the law of France the memoranda would be admissible, and that the French Courts would have held the will to pass all the property.

The rule that the law of the testator's domicile normally controlled the construction of the will was simple, so long as the English law required the will to be formally good by the law of that domicile at the date of his death. But now that a British subject may make a good will either by that law, or by the law of his domicile at the time of making, or by the law of his domicile of origin, or by the law of the place where he makes it, difficult questions may arise in interpreting his meaning. For it is obvious that many cases may occur where the testator did not intend the law of his domicile at death to govern the construction of the will, and where it would be very unjust to introduce that law into its interpretation. The old rule has been so far modified by statute that the primary law to which reference is now made for settling questions of construction is the law of the domicile at the time the will was made; since by Lord Kingsdown's Act the construction of any will is not to be altered "by reason of any subsequent change of domicile of the person making the same." But, even with this modification, hard cases will still occur, when if the rules of construction of the law of the domicile are strictly applied, the testator's intentions will not be carried out, and one law will be applied to the validity of the will and another to its interpretation. For the will may be valid if made

according to the form required by the domicile of origin which may not be the domicile at the time of making the will. Hence the tendency appears to be growing to have regard to an express or implied intention on the part of the testator, in derogation of the direction of the law of the domicile as to construction.

Thus in *Re Price, Tomlin* v. *Latter*, 1900 (1 Ch. 443), Stirling, J. (at p. 453), held that an indication by the testatrix that the will should be considered "in England the same as in France" was sufficient to entitle the application of English rules of construction as to the execution of a power of appointment, though the testatrix was domiciled in France. It should be noted, however, that the authority of this case has been carefully limited by the later decisions in *Re D'Este's Settlement*, 1903 (1 Ch. 898), and in *Re Scholefield* (1905, 2 Ch. 408), where in similar circumstances the English rule as to construction has not been applied, because there was no such explicit statement in the will. The cases are dealt with more fully in the next chapter.

It has been held, too, by the Privy Council that the fact that a will is made in English form is not enough to justify the introduction of English doctrines as to illusory and unsubstantial appointments under a power, in construing the will of a testator domiciled in Lower Canada, where the law recognizes no such doctrine (*McGibbon* v. *Abbott*, 10 A. C. 653). They limited the authority of an earlier case in the Privy Council, *Marten* v. *Lee* (4 Moo. P. C. 142), to the particular point decided in it, that the word "children" in a will written in English by a testator domiciled in Lower Canada was not intended to have the more extended meaning which may be given to the word "enfants" under the old French law; and they rejected the suggestion that the fact that the testator makes his will in a language different from that of his domicile necessarily ousts the rule of construction of the law of the domicile. But where a testator domiciled in England has used the technical language of a foreign country in making his will, it has been

held that the construction of these terms depends on the law in which they are technical. Cf. *Bradford* v. *Young* (26 C. D. 656 and 29 C. D. 617) and *In re Cliff's Trust* (1892, 2 Ch. 229). The first was the case of a will made by an Englishman in Scottish form; the second of a will made by an Englishman in France and in the French language. Though the question of domicile was not definitely decided, the Judge declared that he could not decide the meaning of the will without the assistance of French lawyers. All that it is safe to say in the present state of the authorities is that the construction of a will depends upon the law of the testator's domicile at the time of making it, save where the testator has expressed another intention, or there are special circumstances which justify the application of a different law.

In the Scottish decisions there is likewise apparent a tendency to relax the strict rule, which makes the law of the testator's domicile govern the construction of the will, and to admit the *lex loci actus* in its place: though it has been pointed out by McLaren in his Law of Wills and Successions, that there is much uncertainty about the existing state of the law. In a case where the will was expressed in popular (Scotch) language, though the testator's domicile was England, Scotch law was applied to its interpretation (*Ferguson* v. *Marjoribanks*, 15 D. 637; and *Thompson's Trustees* v. *Alexander*, 14 D. 207). On the other hand, where a will was executed in New Zealand, and the Trustees and solicitor were both in New Zealand, and the will disposed of real estate in the colony, it was nevertheless held that Scotch law as the law of the domicile must be looked to for the true meaning and construction of the will (cf. *Smith* v. *Smith*, 1891, 18 R. 1036).

In the absence of a clear authority, it is submitted that where a conflict exists between the canons of interpretation of the two countries, it is more consonant with reason and more convenient in practice that, in default of a contrary indication, the will should be construed in the light of the law of the place where it was executed. This course would give effect to the

volition of the testator which it should be the aim of the law to effectuate: the rule which makes the law of the domicile at death or even at the time of making the will regulate the construction of a will should not be regarded as rigid, but as a *primâ facie* rule, based on the probability that the testator so intended which, however, may be ousted by anything in the particular instrument that shows a different intention.

The law of the domicile applies its rules of construction to determine whether a general bequest includes debts due to the testator; if there is no clear intention on the part of the testator, the rule is that debts inhere in the person of the creditor (*nomina ossibus inhaerent*), and devolve according to the law of the domicile; but otherwise the succession to the debts is regulated by the construction of the will. Thus in *Nisbett* v. *Murray* (5 Ves. 149), where the testator was domiciled in Jamaica, the Court held that a debt, originally due to him from persons in Jamaica but for which a person resident in England had become responsible, did not pass under a bequest of "the residue in Jamaica;" while in *Guthrie* v. *Walrond* (22 C. D. 573), where the testator was domiciled in England, a bequest of "all his estate and effects in Mauritius" was held to include the purchase-money of real estate in that island which was due to him at his death.

It is the law of the domicile likewise which determines the effect of a testamentary gift in satisfying debts or previous obligations of the testator; cf. *Campbell* v. *Campbell*, 1866 (L. R. 1 Eq. 383), where it was held that a will, by which the testator domiciled in England made provision for portions to his grandchildren, operated as a satisfaction of provision made for them by a Marriage Settlement which he had made in Scottish form.

Again, it is the law of the testator's domicile which determines whether a legacy has lapsed by the predecease of the legatee (cf. *Anstruther* v. *Chalmers*, 2 Sim. p. 1). There a will which was executed in Scotland by a native of Scotland, domiciled, however, in England, was made in the Scottish form

and in favour of the testatrix's brother who died in her life. Though there would not have been a lapse by the Scotch law, it was held that the English law applied, and the bequest failed. It was argued, and apparently the Court accepted the argument, that it was a case of construction in which the law of the domicile alone was to be considered; but it may be doubted whether in similar circumstances to-day the same inference would be drawn. The case illustrates the difficulty of determining whether a particular point is a matter of construction or a question of the operation of the will.

The effect upon personal property of a will where the testator leaves immoveable property in one country and moveable property in another has already been partly considered (see above, p. 63 ff.), but there are a few points arising out of the distribution of such an estate which call for further notice. Thus, though to pass real estate a will must satisfy the forms and conditions of the *lex situs*, a will which purports to pass both real estate and personal estate, and being made according to the law of the testator's domicile is valid as to the latter but invalid as to the former, may affect indirectly the succession both to the personal and the real estate by raising a case of election against the heir (cf. *Brodie* v. *Barry*, 1813, 2 Ves. and B. 127). There the heir of heritable property in Scotland was put to his election by a legacy of personal estate contained in an English will, because the Scotch law disentitled the heir to take the realty, which the testator had intended but failed to dispose of by the will, without collating the personalty left by the same will. The rule of the English and the Scottish Courts is that where the testator devises foreign immoveable property under a will which is inoperative to pass it, and being domiciled in the one or the other country bequeaths moveable property wherever situate to the same person, the heir will not be allowed to take any benefit under the will as regards the moveable property, unless he fulfils the conditions of the will with regard to the foreign immoveable property (*Dewar* v. *Maitland*, 1866, L. R. 2 Eg. 834; *Harrison* v. *Harrison*, 1873,

L. R. 8 Ch. 342; *Orrell* v. *Orrell*, 1871, L. R. 6 Ch. 302). But there must be a clear intention on the part of the testator to dispose by his will of the foreign immoveables; and where this does not appear, the heir will not be put to his election in taking the bequests to which he is entitled under the will (*Allen* v. *Anderson*, 1846, 5 Har. 163).

The general construction of the will from which the intention is to be gathered depends in general upon the law of the testator's domicile (*Dundas* v. *Dundas*, 2 Dow. & Cl. 349); but this rule is subject to a qualification. It has been held that the universality of a gift of property contained in a will is not sufficient to demonstrate or to create a ground of inference that the testator meant it to extend to property which is incapable, though his own, of being given by the particular instrument (cf. *Maxwell* v. *Maxwell*, 1852, 2 De G. M. G. 705, followed in *Baring* v. *Ashburton*, 1886, 54 L. T. 463). Thus if a testator domiciled here makes a general bequest of all his residue, that is not a sufficient indication on which to ground an intention of passing real property abroad, which could not pass by the will made in the English form. But if the property which could not pass by the will is expressly denoted, this rule does not apply (cf. *Brodie* v. *Barry*, 2 Ves. and B. 130). The *lex situs* of the real estate may prescribe certain formalities or forms of words as necessary to pass such estate by will; and in the absence of these formalities or phrases, the intention which would be held to exist by the law of the domicile cannot be inferred so as to establish a case of election (*Johnson* v. *Telford*, 1 R. & M. 249). Hence the technical rule of the English law was formerly invoked on behalf of the legatee, viz. that real property must be explicitly devised, and general terms such as "all or any real and personal estate wherever situate" were not sufficient to show the testator's intention to dispose of property incapable of passing under the will.

Formerly also Scottish immoveable property did not pass under general words in an English will in the ordinary form. But by the Act of 1868 (31 & 32 Vict. ch. 101, s. 20) Scottish

immoveable property can now be disposed of in a will by the same general words as are adequate to dispose of moveable property ; and therefore a general disposition in an English will is now usually adequate to pass the whole of the testator's estate in Scotland, and cases of election are much rarer than before.

In accordance with the Statute it was held that where a testator domiciled in England devised real estate in Scotland as well as in England according to English technical terms, the disposition was good, and English rules of construction applied throughout (cf. *Studd* v. *Cook*, 1883 (5 App. Cas. 577). But the doctrine of election may still be raised in respect of wills purporting to dispose both of immoveable property in other countries and of English personalty, and in such cases complex questions of construction have to be decided. The confusion caused over these cases where real estate in one country and personal estate in another are sought to be disposed of by a will which is not valid by the *lex situs* of the real estate, and the probable defeat of the testator's intention as to his succession, emphasize the desirability of establishing one principle for universal succession. The doctrine of election and the statutory provisions which have been introduced to mitigate the severity of the existing rule are only a patchwork, and the true reform of the law, it is submitted, would be to make a will good by the law of the domicile valid to pass the whole estate of the testator, and to make all the incidents of the succession subject to that one law, save in so far as the testator indicated any other intention, or introduced provisions which were contrary to the public policy of the *lex situs* of his immoveable property.

CHAPTER VI

LIMITATIONS OF THE REGULATION OF THE SUCCESSION BY THE LAW OF THE DOMICILE

I. *The Form of the Will: Locus regit actum.*

THE rule of law conveyed by the Latin phrase "*Locus regit actum,*" which means that the forms of a legal act are prescribed by the law of the place where it is accomplished, was accepted on the Continent for certain actions, so soon as the science of private international law began to be developed. Thus it was held that a contract of sale or a conveyance of foreign property was valid, if made according to the forms of the law of the country in which it was executed. And the same principle was early adopted in many countries for a will and testamentary dispositions. The reason for the rule is obvious—that when a person is executing a legal act in a foreign country, either when he is residing there or is simply passing through it, he can more easily ascertain and comply with the requirements of the local law in regard to the forms of the act, than with those of either his national law or the law of his domicile. The consent of nations therefore was obtained for the validity of a legal document which was valid in its external form according to the rules of the place where it was done, provided that it was valid as regards its substance according to the personal law of the "actor."

The English law, however, though it adopted the principle in regard to contracts, did not for a long time extend it to testamentary dispositions, and required a will, as a condition of

its validity, to comply as well in its external form as in its substance with the law of the testator's domicile. Thus it was held in a long series of cases[1] that wills made by British subjects in the forms of the place where they were living at the time they made the wills were invalid, if subsequently they acquire a foreign domicile, unless indeed the Courts of that domicile regarded them as good. In that last case, the English Courts accepted the *renvoi*, and admitted a will made in English form by a testator domiciled here at the time (cf. *Collier and Rivaz; and Bremer and Freeman*, etc.).[2] But in view of the great hardships which resulted to the families of English testators by virtue of this rule, Lord Kingsdown's Act was passed in 1861, by which the will of a British subject was to be held well executed as regards personal estate, if executed (*a*) either according to the forms required by the laws of the part of the United Kingdom where it was made, or (*b*) when made out of the United Kingdom, if made either (1) according to the forms required by the law of the place where it was made, or (2) by the law of the place where the testator was domiciled at the time he made it, or by the laws of that part of the British dominions where he had his domicile of origin.

The English Court may determine for itself, upon evidence of what is the foreign law, whether the will is valid by the law of the place where it is made. If satisfied upon the point, it will admit it to probate here, although it has not been adjudicated upon in the foreign Courts. Thus recently it admitted the writing (a post-card) of an English woman domiciled here, but residing in France, purporting to dispose of her personal estate, which document she had written in her own hand and signed, but by an inadvertent error dated incorrectly. By French law a holograph will to be valid must bear the date on which it is made in the testator's handwriting, and a wrong date is regarded as no date; so that a holograph will wrongly dated is *primâ facie* invalid. But the invalidity may be rebutted by showing that the mistake was due to

[1] See above, Chapter I.

[2] See later, Chapter VIII.

inadvertence, and the Court came to the conclusion that the French Courts would in this case have granted relief (*Lyne* v. *De La Ferté*, 1910, 102 L. T. 143). Just as the English Court in construing the will of an English testator seeks to place itself in the armchair of the testator, so in considering the will of a testator made according to foreign law, it places itself, so to speak, in the armchair of the foreign judge.

The Court, however, will consider the testamentary documents as a whole, and will not admit to probate a codicil, though it is well executed according to the law of the place where it was made, in a case in which the will is not good, and by the law of the country where it was made the codicil would not receive a separate existence: cf. *Pechell* v. *Hilderley* (L. R. 1 P. & D. 673). In that case an English testator had made a will in Italy, which did not comply either with the Italian or the English forms, and a codicil which complied with the former; and it was urged that as this codicil purported to confirm the will and was in itself well executed, the whole of the testamentary papers were valid. But the Court refused to accede to the proposal that it should thus combine principles of English and Italian law, so as to hold testamentary papers good which in their totality were valid by neither law. As Lord Penzance said, "In determining the question whether any paper is testamentary, regard can be had to the law of one country only at a time; and the mixing up of legal precepts of two different countries can only result in conclusions conformable to neither."

If the law of the country where the will is made prescribes no particular forms for testamentary documents, the English Court will admit as valid a will made according to the general principles of law and equity. Thus in *Stokes* v. *Stokes* (67 L. J., P. 55), where a British subject had made a will roughly in English form in the Congo Free State, the English Court admitted it, on the ground that it satisfied these general principles, and the local law did not prescribe any particular forms. The same rule, it is presumed, would be applied to

wills made by British subjects in Oriental or semi-oriental countries, which do not prescribe a particular form of will for European residents.

There is little doubt that a will well executed under Lord Kingsdown's Act will pass English leaseholds[1] (cf. *Re Watson*, 1887, W. N. 140, and *Re Grassi*, 1905, 1 Ch. 584); but the adequacy of such a will to execute a power of appointment by will is more doubtful, and is discussed at length later.[2]

It is to be noticed that the Act (*a*) applies only to the wills of personal estate of British subjects, and (*b*) only deals with their formal validity for purposes of probate. Questions of capacity or restriction on alienation are not affected by its terms, and remain in English jurisprudence subject to the law of the testator's domicile at the time of making the will or at death. As to the persons affected by the Act, the term "British subject" has been held to include naturalized as well as native British subjects: cf. *In the Goods of Gally* (L. R. 1 P. D. 438), where the will made by an Italian in English form while he was domiciled in England and a naturalized British subject, was held good, though the testator died domiciled in Italy. The rule was carried a step further in *In the Goods of Lacroix* (L. R. 2 P. D. 94), when the Court admitted to probate the will of a Frenchman, who had been naturalized in England, executed at Paris in English form, it being proved that this was a form permitted by the law of France (the *locus actus*) in the case of British subjects resident in France. The English Court here accepted in its entirety the law of the place where the will was made, in accordance with its habitual practice in dealing with foreign law. On the other hand, where a natural-born British subject, who by her marriage had become German, executed a will in Germany according to the English form, it was held invalid, as not being within the provisions of the statute, nor presumably valid according to the law of the domicile (*In the Goods of Baroness von Buseck*, 6 P. D. 211).

It was argued in this case, and subsequently also in *Bloxam*

[1] Cf. Chap. III. p. 55.

[2] Cf. pp. 129–131.

v. *Favre*, where the circumstances were similar (1883, 8 P. D. 101, affirmed in 9 P. D. 130), that the effect of the Naturalization Act, 1870, was to make the will of an alien, whether so originally, or by marriage with a foreign husband, valid as to personal property in England, if made according to the forms of the domicile of origin. But the argument failed, and it was held that the will of a person who has lost British nationality is not covered by the Act. By section 2 of the Naturalization Act, it was enacted that real and personal property of every description may be taken, acquired, held and disposed of by an alien in the same manner in all respects as by a natural-born British subject; and it was argued that "in the same manner" meant according to the same forms. But this proposed interpretation was rejected as unreasonable, on the ground that the object of the enactment was to do away with the disabilities of aliens, but not to alter in respect to them the general principle as to the control of the law of the domicile over testamentary disposition. Subsequently in *Re the Goods of Keller*, 1891 (61 L. J. p. 39), the Court refused to admit to probate the will of a foreigner domiciled in England at the time it was made, which was executed according to the law of the testator's domicile of origin.

Before the Naturalization Act was passed, it was held that an Italian who was domiciled in England, and had received a naturalization certificate under the existing Act (6 & 7 Vict. ch. 66), could not while in Italy make a good codicil to his will, which was valid according to the law of the place where it was made, but not duly executed according to the English law (*In the Goods of Gatti*, 27 W. R. 323). The earlier Naturalization statute excepted from the rights of a naturalized subject "any rights and capacities of a natural-born British subject out of and beyond the dominions of the British Crown and the limits thereof." The same disability no longer affects naturalized subjects (cf. *Re Lacroix*, above), but the more serious grievance remains that the will of a foreign subject, who is not naturalized in England, or of a native English subject who is naturalized

abroad, is still subject to the strict rule of domicile, and is invalid as regards personal property in England, unless it complies with the forms required by the law of the domicile of the testator, either at the time of his making it or at the time of his death. The sole indulgence which the Act of 1861 extends to the wills of aliens is that they are no longer invalidated by a change of domicile between the time of making and death, if they were well executed at the former period (cf. *In the Goods of Groos*, 1904, P. 269). But the will of a foreign subject made in England according to the English form, or made abroad in the forms of the place where it was executed, not being the place of the domicile, is still treated in our Courts as invalid to dispose of moveable property in England (cf. *De Fogassieras* v. *Dupont* (11 L. R. Ir. 123)).

This survival in "the Herculaneum of feudalism" of the stringent application of the law of the domicile to the form of wills of resident foreigners can no longer be justified either on the grounds of reason, or consistency, or the consent of nations. The Act of 1861 recognized the reasonableness of allowing a British subject to make his will according to the forms required in the place where he is living when he makes it; and what is reasonable for a British subject is not less reasonable for a foreign subject.

The present state of the English law shows, on the one hand, an extreme (though not an unreasonable) liberality to British subjects as regards the formal requisites for a testamentary document, and on the other an extreme and unreasonable illiberality towards foreign subjects. The Act makes the law of the domicile no longer the exclusive authority over the forms of a will; and once the exclusive principle has been abandoned, it is only fair to extend the freedom to all persons, regardless of any question of nationality. Indeed, it may be said that the differentiation made by Lord Kingsdown's Act between British subjects and others is fundamentally false to the principle of English international jurisprudence, which pays close attention to domicile and not to political nationality.

Lastly, the consensus of foreign nations favours the application of the principle of the rule "*locus regit actum*" to the wills of all persons. It is, therefore, desirable that the English law should be amended, so as to extend to foreign subjects the provisions of Lord Kingsdown's Act, or at least that part of the Act which entitles a will to be admitted to probate, if it complies with the forms of the law of the place where it was made.

The opposite kind of hardship to that which is imposed upon aliens making their wills in England was till recently imposed by the French law upon foreigners making their wills in France. It had been held by the Court of Cassation in *Re Browning*, 1853 (Sirey, 1853, 1, 274), that the rule "*locus regit actum*" was universally applicable to wills and obligatory. Where an English testator intended to make a French holograph will, but he did not write the whole will himself, and two codicils which he added, though written by him, were dated by another person, the French Court held the will and codicils invalid. Subsequently the French Courts in several cases held the wills of Englishmen, made in English form in France, to be invalid, both as to moveables and immoveables in France, though they were good as to both in England (*In re Rippin*, 3 S. & T. 177; *In re Rafferel*, 3 S. & T. 49). There has been a great deal of controversy since upon the question, and the balance of juristic opinion has been in favour of the optional character of the rule "*locus regit actum*." But it was not till 1909 that an authoritative decision was given in this sense, overruling the former opinion of the Chambre de Requêtes in 1853.

The case in which the new ruling was given, *Gessling* v. *Viditz*, had had a checkered career before the French Courts, extending over fourteen years, and arose out of the will of an English lady made in France in English form with two witnesses. The Courts of Appeal in Paris and Orleans successively held that the will was not good in point of form for non-compliance with the local law. But the highest tribunal, while

adhering strictly to the general principle that the extrinsic form of written instruments is governed by the laws of the country where they are executed, a principle which applies to wills in common with other instruments, held nevertheless that this is a rule which is merely optional in so far as private wills are concerned—that is to say, wills which do not require the intervention of a notary or other public officer. The result is that to-day the will of an Englishman made in France, either in the French form or the English form, will be held formally valid, whether it comes before the English or the French Courts; and it is submitted that our law should secure the reciprocal arrangement by which the will of a Frenchman made in England, either in the English or the French form, should be held formally valid in our Courts, as it would be if it came before the French tribunals. Before the decision of the Court of Cassation was given, the New York Appellate Court had held good the will made in the American form by an American subject domiciled in France (195 N. Y. 527) (cf. Amer. Law. Rev., 1910, p. 451), thus bringing American practice into agreement with the English.

It is significant, moreover, of international opinion upon the subject, that at the Hague Conference upon Private International Law in 1903, a rule was proposed, though not finally inserted in the "act" of the conference, which adopts the principle of *locus regit actum*, but makes it optional for private instruments: "La forme des actes est réglée par la loi du lieu où ils sont faits ou passés. Néanmoins les actes sous seing privé peuvent être faits dans les formes admises par les lois nationales identiques de toutes les parties." England cannot remain for ever in the position of "splendid isolation" upon the rules of private international law, and it is submitted that the continental principle of allowing a will to be accepted as to the form where it follows the *lex loci actus*, is the juster and the more reasonable, and should therefore be wholly adopted into our jurisprudence, where it has already received a partial acceptance.

In the Northern part of the United Kingdom, the law has regularly accepted the rule *locus regit actum* in regard to the form of wills, and accepted it in the optional sense, which the better opinion on the Continent now favours. It requires, then, only the complete adherence in England to the rule to make it an established part of the law of nations respecting succession to moveable property.

II. *Wills exercising a Power of Appointment.*

Besides the statutory modification of the principle of domicile in matters of testamentary succession, there is a doctrine firmly established by a long line of decisions in English Courts, which further modifies that principle in relation to wills exercising powers of appointment, either general or special.

According to English law, "the making of a will and the exercise by will of a power of appointment are essentially different things." The ordinary testator disposes of his own property, and exercises his own testamentary capacity; but the donee of a power is regarded as disposing of the property of another (though he may have a large interest in the property), and as carrying out the intentions of the donor. He is an agent or mandatory, as it has been said: "The power given is a mandate: the moment that mandate is exercised it seems to me that the mandator's intention takes legal effect, not from the exercise of the mandate, but from the gift of the person who delegated the power to exercise his will" (per Brett, L.J. *In re D'Angibau*, 15 C. D. at p. 243). It has been deduced from this theory of the nature of powers of appointment, that their exercise by will should be regulated rather by the law of the donor's domicile or the terms of the power which he instituted, than by the law of the testator's domicile, which would ordinarily govern his capacity to make a will and also its formal validity. The will exercising the power is viewed as a delegated act of the donor, and compliance either with his law or his express direction is adequate to make the act of his agent

valid in an English Court. The rules as to wills exercising powers are peculiar to English or rather British law, since foreign systems have nothing which corresponds to the English practice.

The principle was first applied to questions involving a conflict of laws in the case of a will disposing of personal estate situate in England, executed in compliance with the requisites of an English power of appointment, but not according to the testamentary law of the domicile of the donee. *Tatnell* v. *Hankey,* 1838 (2 Moo. P. C. 342). The testatrix there, while resident in Paris, made and executed her will in the presence of three witnesses, disposing of the whole of her real and personal estate. Subsequently she acquired a domicile, and died, at Naples. The Privy Council held that she had well executed the power given to her in her father's will, and that an English Ecclesiastical Court which had repudiated jurisdiction was bound to declare whether the instrument propounded was in its nature testamentary; Lord Brougham laid down the general principle which governs the constitution of a power to be that: "Whatever is given by the donor of a power in execution of that power passes to the Appointee or the party in whose favour the power is executed by the *donor* (*a*), but is conveyed not by force of the appointment or by any act of the donee, but by the act of the donor of the power, by virtue in fact of the power, and not of the appointment under it." The reported judgment, however, did not deal explicitly with the question of the effect of the law of the domicile on the will made in exercise of the power of appointment; and Sir G. Cresswell in the case of *Crookenden* v. *Fuller,* 1859 (8 W. R. 49), held that the law of the domicile determined the validity of such a will.

But a little later in the case of *Re Sophia Alexander,* 1861 (9 W. R. 451), he retracted that opinion, and held the will of the testatrix duly made according to the terms of a power to be valid, though she had subsequently changed her domicile from

(*a*) The words are so reported; but *donee* seems to be intended.

England to Scotland. He mentioned that since his former judgment he had ascertained the opinion of the Judicial Committee in *Tatnell* v. *Hankey* to be that the validity of a will, so far as regards the appointment of the residue of personal estate, does not depend upon the law of the domicile of the donee.

Sir J. P. Wilde followed this decision, albeit unwillingly, in *In the Goods of Hallyburton*, 1866 (L. R. 1 P. & D. 90), holding an exercise of a power by will to be admissible to probate, where it followed the terms of the power, but would not have been good as a will by the law (English) of the testatrix' domicile. Later Sir F. H. Jeune, though again unwillingly, felt compelled to follow the growing line of authorities; and in *In the Goods of Huber* (1896, p. 209) held as valid the will of a testatrix who at the time of her death had a French domicile, and had executed the will in English form in pursuance of a power. It was invalid according to French law, and apart from its being in pursuance of the power would not have been valid in England (cf. *Bloxam* v. *Favre* (sup.), 9 P. D. 130). A last attempt to upset the doctrine was made as recently as 1909 in the Irish Appeal: *Murphy* v. *Deichler*, 1909 (A. C. p. 446). There, however, the House of Lords ruled that there was a well-established practice, which should not be altered, holding it a proper exercise of an English power of appointment by will, if the fund is appointed by a will in the English forms, even though the person appointing be domiciled abroad (as here, in Germany), and the will be not validly executed according to the law of the domicile. The document may be admitted to probate as a will for the purposes of appointment, though it may not be admissible for other purposes.

The limitation of the grant of administration here mentioned is usual in the case of wills which are only valid as exercising a power of appointment. The succession to any personal property of the same testator or testatrix, which is not subject to the power, is governed by the general law; and therefore the will must formally as well as substantially be valid by the law

of the domicile to pass such other property. The grant of probate is therefore regularly limited "to such property as the deceased had power to dispose of and did dispose of by the instrument executing the appointment" (cf. *In the Goods of Tréfond*, 1899, p. 247). Moreover, it was there pointed out by Sir Francis Jeune, quoting Williams on Executors: "If a person having a general power of appointment by will bequeath the fund the subject of appointment to executors in trust, and the trust fails as regards the particular object, the resulting trust will be in favour of the next of kin or the residuary legatee as the case may be of the testator, and not in favour of the person entitled in default of appointment, and the next of kin will be determined by the law of the testator's domicile and not by the law of the domicile of the donor of the power." That is to say, when once the fund the subject of appointment has been appointed by the donee of the power, it ceases to be regarded as subject to the law of the donor.

The privilege accorded to wills exercising a power of appointment affects not only their formal validity, but questions of capacity. Just as it has been held that an infant can appoint by deed, though he has no disposing capacity over his own property (*In re D'Angibau*, *u. s.*), so a married woman can appoint by will, though she has no general testamentary capacity (*Barnes* v. *Vincent*, 5 Moo. P. C., p. 201); and so, too, where there is a difference between the English and the foreign law as to testamentary capacity, and the donor of the power is domiciled in England and the donee in a foreign country, it is the law of the donor's country which governs the capacity of the donee's exercise of the power by will. In *Pouey* v. *Hordern* (1900, 1 Ch. 492), a case arising out of the same settlement as *In the Goods of Huber*, Farwell, J., upheld the validity of an appointment by an Englishwoman married to a French subject, though she disposed of the property in a way not permitted by the law of France. By that law her power of disposition was limited to one fourth of the property she had on marriage; but the judge held that the execution of any power of appointment

validly executed and given to a foreigner, is in no way affected, by any disability which he or she may be under to dispose of his or her own property by the law of his or her domicile. Different considerations, he added, would arise if the appointee predeceased the appointor by will, and the effect of the appointment was held to be to take the appointed property out of the instrument creating the power for all purposes, and to make it part of the property of the appointor. In such a case presumably the law of the appointor's domicile would govern the validity of the will.

In *Pouey* v. *Hordern* the Court had to consider the exercise of a special power of appointment; but Farwell, J., on the authority of *In re Price* (1900, 1 Ch. 442), seemed to think that the capacity to exercise a general power of appointment was likewise governed by the law of the donor's domicile. All, however, that *In re Price* decides (see later) is that the formal validity and construction of a will executing a general power of appointment are determined by that law, and it might have been questioned whether the capacity to dispose should in such a case be held to be independent of the law of the appointing testator's domicile.

But in the case of *Re Mégret: Tweedie* v. *Maunder*, 1901 (1 Ch. 541), it was held by Cozens-Hardy, J., that an Englishwoman married to a domiciled Frenchman could pass freely by will English personal property, which was settled in English form with English trustees on such trusts as she should by will appoint, and subject thereto for her separate use; and the limitations imposed upon her testamentary disposition by French law were disregarded. The Judge claimed to be following the authority of Byrne, J., in *In re Bald*, 1897 (76 L. T. 462), where it was held that a general power of appointment created by a Scottish will must be governed by Scottish law, whatever may be the domicile of the donee of the power. But that case again only dealt with the formal validity of the will executing the power. However, in view of the *dictum* in *Pouey* v. *Hordern*, and the express decision in *Re Mégret*, it may be said that the

The rule as to the effect of the law of the domicile upon the exercise of a general power is now modified by the decision of the Court of Appeal given on May 31st, 1911, in *Re Pryce, Lawford* v. *Pryce.* See Addendum.

present state of the law is that capacity to dispose by will in exercise of a general no less than of a special power of appointment is not affected by the law of the donee's domicile.

One line of cases, therefore, affirms the formal and substantial validity of a will exercising a power of appointment, which is made either in the forms required by the instrument creating the power, or in the forms required for an English will by the Wills Act, 1837 (which latter forms are declared by that Act to be sufficient for the testamentary exercise of a power), even though it does not comply with the forms and conditions required for a will by the law of the domicile of the donee.

But there is another line of cases which establishes the right to probate, and the effective validity, of a will exercising a power of appointment, which complies not with the formal requirements of the English Wills Act, but either with the requirements of the law of the testator's domicile for a will, or with the provisions of Lord Kingsdown's Act; provided only that there is nothing in the instrument creating the power that imposes special conditions upon the testamentary exercise which have not been complied with. In other words, where a will made abroad is entitled to probate or to a grant of administration as a will, apart from its function in exercising an English power, it will be held to be a good testamentary exercise of that power, unless it violates the express directions of the donor of the power as to its formal validity. But it is only where the will is made in accordance with the forms of the Wills Act, 1837, that by statute the express directions of the founder of the power as to the mode of executing it by will may be disregarded.

Lord Cranworth, indeed, in the case of *Dolphin* v. *Robins*, 1858 (7 H. L. C. 390), inclined to the opinion that a French will made by an Englishwoman domiciled in France would not operate as a good execution of an English power; but the opinion was not adopted when the point came up for decision. Where the will is executed in accordance with the law of the

testator's domicile, it has been held to be a good exercise of a simple power to appoint by will (cf. *D'Huart* v. *Harkness*, 1865, 34 B. 328). There the testatrix (who died before the Wills Act came into force) was domiciled in France, and left a will in the forms required by French law. The Judge (Romilly, M.R.) held that it was properly admitted to proof in England, and operated to execute a power of appointment over English personalty. "When a person (he said) simply directs that a sum of money shall be held subject to a power of appointment by will, he does not mean any one particular form of will recognized by the law of this country, but any will which is entitled to probate here" (p. 328). The same Judge had previously held in *In re Daly's Settlement*, 1858 (25 B. 456), that a will executed in accordance with the law of the testator's French domicile was nevertheless invalid as an exercise of a power, for want of compliance with special terms as to execution required by the power, thus establishing a clear difference between simple appointment and appointment directed in special form.

So, too, where a power was to be exercised by will attested by two witnesses, it was held that the holograph will of a testatrix, a domiciled Frenchwoman, which was not attested, though good as a will by French law, was not a good execution of the power, and the fund subject to the power passed as in default of appointment (cf. *Barretto* v. *Young*, 1900, 2 Ch. 339). As Byrne, J., pointed out, the provisions of ss. 9 and 10 of the Wills Act have no application to wills of persons not domiciled in England (p. 343), and that being so, the will to be a good exercise of the power must comply with the terms of the power. And as the aiding by the Court of the defect in the execution of the particular power would not have operated in favour of the children of the donor, the Judge did not think fit to take that step. But in the later case of *In re Walker* (1908, 1 Ch. 566), Joyce, J., following *In re Price*, held that a codicil of a testatrix, domiciled in Scotland, which was validly executed according to Scottish law, operated as an execution of an

English power of appointment by will over English personal property; and though it was defective because not signed in the presence of, or attested by, two witnesses as required by the terms of the power, it was aided by the Court in favour of children of the testatrix. Where the power of appointment is not validly executed according to the donor's direction, the will would be valid as to property not subject to the power; thus offering the converse case to those above mentioned where the will of a person domiciled abroad, made according to the forms of English law or the terms of the power, has been held good only as to the property subject to the power.

It is still somewhat doubtful whether a will of a British subject, validly made abroad according to Lord Kingsdown's Act, operates as a good exercise of a simple power to appoint by will, though the *dictum* in the case of *In re Price* (1900, 1 Ch.), which was followed in *In re Walker*, *McColl* v. *Bruce* (1908, 1 Ch. 566), just referred to, has largely cleared up the point. In the principal case, Stirling, J., had to consider the will of a Frenchwoman which was good according to French forms; and therefore he was not directly concerned with a will made under Lord Kingsdown's Act. But he approved the full application of the general principle of *D'Huart* v. *Harkness*, that a power to appoint by will simply may be executed by any will which according to the law of this country is valid, though it does not follow the forms of the statute (*i.e.* of the Wills Act, 1837) as to attestation by two witnesses. He was pressed with two decisions: *In re Kirwan's Trusts* (25 C. D. 373), and *Hummel* v. *Hummel*, 1898 (1 Ch. 642), where it had been held respectively that a codicil and a will valid according to Lord Kingsdown's Act, were not good executions of a power to appoint by will. But in the first case the terms of the power were "by deed or will to be executed in the presence of two or more witnesses . . . to appoint among children." The codicil not complying with these terms, though valid according to the law of France where it was made, was, it is submitted, properly rejected, on the principle that any

testamentary execution of a power must comply with the terms of the power, unless it is made in accordance with the Wills Act, 1837 (see above). That rule applies as much to a will admitted to probate under Lord Kingsdown's Act, as to one admitted because valid by the law of the testator's domicile.

In *Hummel* v. *Hummel*, Kekewich, J., indeed seems, if correctly reported, to have approved the statement of Williams on Executors, that in the case of a will which is only valid by Lord Kingsdown's Act, the Wills Act must be complied with, if it is to operate as an execution of even a simple power of appointment by will. Stirling, J., however, definitely dissented from this opinion; and it is submitted that it is wrong in principle and altogether unreasonable, since a will made according to the Statute is as much a valid will as any other. The better opinion, then, appears to be that, where no special conditions are prescribed, a power of testamentary appointment can be exercised by any will which is in itself valid. This doctrine is approved by Dicey, who also expressly dissents from *Hummel* v. *Hummel* (*op. cit.*, Note 20, p. 825), and points out that the testatrix in that case was an Austrian subject, so that the Act of 1861 had no proper application at all to her will.

On principle and on the balance of authority, therefore, it is submitted that any will should be held to operate as a good execution of a simple power to appoint by will, which is admissible to probate in England, either under the Wills Act or Lord Kingsdown's Act, or as valid by the law of the testator's domicile. To clear up any doubt, it might be well to pass an amending statute to Lord Kingsdown's Act in this sense.

Finally, the construction of a will executing a power of appointment may be governed not by the law of the testator's foreign domicile, but by the English law, either where the will is made in accordance with the English Wills Act, 1837, or where an intention to call in the English rules of construction is expressed or may be inferred. The principle of this rule,

again, is that the will is regarded as disposing of the property, and carrying out the intention, of the founder of the power, whose law therefore naturally regulates doubtful points in the succession. The English rule of construction which is chiefly in question in such cases, is section 27 of the Wills Act, which provides that a bequest of the personal estate of the testator, or any bequest of personal property described in a general manner, shall be construed to include any personal estate which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will.

Accordingly it was held in *Re Harman* (1894, 3 Ch. 607), that a bequest by an English lady domiciled in France of "all her properties and chattels" (*tous les biens et droits mobiliers*) operated to pass a sum of English stock over which she had a general power of appointment. The will was French, but the English rule of construction was held to apply, possibly because the intention was clear, possibly because the stock represented the proceeds of English real estate. The question of the applicability of section 27 was not, however, argued. (See per Kekewich, J., in *Re Scholefield*, 1905, 2 Ch. at p. 416.) Again, in *Re Baker's Settlement Trusts* (1908, W. N. 161), a general residuary bequest in the will of an English lady domiciled in Switzerland, which was made in English form, was held to pass property over which she had a general power of appointment. Section 27 of the Wills Act was declared to be applicable to the Will, because English rules of construction were the most reasonable to apply to the whole of the dispositions. Again, in *Re Price's Trusts* (u. s.), it was held that the words of the testatrix, "I declare that this will shall be considered the same in England as in France," were a sufficient indication that she meant English rules of construction to apply to it, and that therefore this provision of the Wills Act applied to her will, though it was made in a foreign form.

But the tendency of two more recent cases is against extending the inference in favour of an English construction,

where the testatrix has not used apt words to show her intention. Cf. *In re D'Este's Settlement Trusts* (1903, 1 Ch. 890), and *In re Scholefield* (1905, 2 Ch. 408). In the former case there was a general bequest of personalty in a will of an Englishwoman domiciled in France which was valid by the law of France, but no words introducing the English rule as to construction; and Buckley, J., held that, though in reading a will executing a power he must read it as if the direction contained in it was introduced into the instrument which created the power (p. 903), he must at the same time, in default of an express or clear indication to the contrary, ascertain the meaning of the donee of the power according to the law of the place applicable to the document executed by the donee and to the domicile of that person, and that law is to be taken as the law governing its construction.

In the latter case (*In re Scholefield*) the will of an English lady domiciled, again, in France constituted a universal legatee of the testatrix's property in England as well as in France, but contained no reference to a general power of appointment vested in the testatrix or to the property subject to it. There were certain unsigned memoranda of the testatrix referring to the property, and showing a clear intention to appoint to the legatee, and evidence was given that by the law of France the will would pass everything which the testatrix could dispose of, and that in a French Court the memoranda would be admissible as evidence. Kekewich, J., however, held that the question of the exercise of the power must be determined upon evidence admissible by English law (*the lex fori*), that the memoranda were not admissible here (*a*), and that there being no reference to English law, section 27 did not apply, and the will was not a valid exercise of the power. An appeal was taken, but the suit was settled before hearing (cf. 1907, 1 Ch. 651).

But though, doubtless, this case, taken with that of *Re D'Este's Settlement*, supports the rule that where a will is valid

(*a*) Cf. *supra*, Chapter V. p. 107.

only by the law of a foreign domicile, *primâ facie* section 27 of the Wills Act is not incorporated, and the will is to be construed irrespective of that section, yet Kekewich, J., it is submitted, went further than was necessary or than authority supported, when he said that section 27 "has no application to any instrument other than an English will." The decision of *In re Price* is opposed to such a proposition, and it is submitted that that decision is correct; and the *primâ facie* exclusion of section 27 from a will made in a foreign form may be set aside, where there is some indication in the will that the testator otherwise intended.

The general trend of the recent decisions on foreign wills exercising powers of appointment has been to extend as far as possible the application of English rules to them, and the grounds on which their validity may be upheld. Seeing that most of the cases arise out of the wills of Englishwomen married to foreigners, to whom consequently the domicile of their husbands has been attributed, and has made them subject to a strange system of law, there are large grounds of public policy as well as of justice for widening as far as possible the exception to the rule, that the law of the testator's domicile regulates the effect of the will, and for making both the formal validity and the construction of a will exercising an English power of appointment depend upon the law of the donor's domicile.

III. *Wills affected by Marriage Settlements and Marriage.*

The law of the testator's domicile may be ousted from its regulation of a will not only by an instrument creating a power of appointment executed by that will, but also by an agreement made under another law to which the testator was a party. The kind of agreement which most frequently has this effect is a marriage settlement, or an antenuptial contract, which may be expressed in a document or implied by law. Such a settlement or contract controls the spouses' power of disposition by

will over the property subject to it, much in the same way as an instrument creating a power of appointment to be exercised by will controls the donee's right of disposition. The general principle governing the cases is that the law which governs a contract is the *lex loci contractus*, and everything which arises out of the contract must be governed by that law. Put in another way, a marriage settlement is often a form of contracting out of the rule which makes the law of the domicile regulate the personal succession. And what has once been agreed between the parties in a form legally binding, cannot be taken away by subsequent unilateral action, even though that action has legal consequences for both parties. Thus, where two English subjects entered into a marriage contract at Paris, in which it was expressed that their "community" was to be regulated by French law, and at that time by the general law of France a wife could make a will, it was held that a will made during the coverture by the wife, disposing of her personal property, was valid, and that the marital right of the husband over the property was excluded (*Este* v. *Smyth*, 1854 (18 B. 112)). The marriage there had not taken place according to French form, nor was the will executed according to French formalities. But it was held that, although English law regulated the marriage, French law, the *lex loci contractus*, regulated the rights of the parties who married; and though not in the form required by the law of the domicile, the will was good, because the property it disposed of was a portion charged on English real estate, and therefore had to comply with the requirements of English law. The French law gave the capacity to make the will, and the English law supported its formal validity.

Again, in *In re Muspratt-Williams* (1901, W. N. 14), where a marriage settlement between a gentleman domiciled in Mauritius and a lady domiciled in Scotland was made in Scotland in Scotch form, and was, as the Court found, intended to be regulated by Scotch law, it was held that the law of Scotland prevailed, so as to give the husband a testamentary power to revoke a contingent limitation in the settlement to persons who

would have been entitled to his property according to the English Statute of Distributions, if he had died without issue and unmarried. So, too, in *Re Mégret* (ibid., p. 15) where a marriage settlement was made in English form between a domiciled Englishwoman and a domiciled Frenchman, which gave the wife an over-riding general power to appoint the trust property by will, it was held that English law alone regulated the wife's power of disposition of the property subject to the settlement, and the French law of the domicile was ousted. (Cf. also *Pouey* v. *Hordern*, 1900, 1 Ch. 492 above.)

The same principle was applied in (1) *Re Hernando* (27 C. D. p. 284), where an Englishwoman, married to a Spaniard and domiciled in Spain, was held to have a valid testamentary power to dispose of her personal property included in the marriage settlement, though by the law of Spain two-thirds of her property under the circumstances would have belonged to her father and mother in spite of the will; and in (2) *Watts* v. *Shrimpton*, 1855 (21 B. 97), where there was an agreement in English form for a settlement on the marriage of a British subject domiciled in France with an Englishwoman, and it was held that English law regulated the disposition of property subsequently acquired by the wife. The report, however, of the case on this point is incomplete (see R. R. cxi. p. 35), as it does not show whether the marriage contract included the wife's interest under her father's will which was the subject-matter of the dispute; had there been no settlement, the Court would have held in that case that the rights of the spouse over property acquired during the coverture were to be governed by English law.

Very recently in the case of *Re Mackenzie, Mackenzie* v. *Edwards-Moss* (*The Times*, March 18th, 1911) it was held by Mr. Justice Swinfen-Eady that where the father of the testatrix made a settlement in English form on his daughter upon her marriage to a Scotchman, by which he settled £20,000 on her for life for her separate use with remainder to her issue, etc., the settlement was entirely governed by English law, and the

wife who had separated from her husband had power to dispose of it freely by will as her separate property. The husband and children claimed a share by virtue of the Scotch *Jus Relicti* and *Legitim* respectively, but the judge rejected their claims on the ground that the law of the domicile did not apply to the property in the wife's settlement. The claims were made under the Married Women's Property Act (Scotland), 1881, which gives a general right to the husband and children in regard to the wife's moveable estate, notwithstanding her disposition of it by will; but it is provided by section 8 of the Act that it is not to affect any contracts made before or during marriage between the parties. And the Court held that even if Scotch law applied to the settlement the result was not affected, because the right of disposition must be regarded as *pars contractus*.

Even though the settlement openly violates the legal order of succession established by the law of the matrimonial domicile, and can thus have no effect there, yet if it is made validly according to English law, and one of the parties to it was a British subject, it will be enforced here upon any property in the jurisdiction of the Court. Cf. *In re Bankes, Reynolds* v. *Ellis* (1902, 2 Ch. 333). The English Court, that is, will go out of its way to oust the law of the matrimonial domicile in its control over the property of the spouse, wherever it can find in a contract an intention of the parties to be governed by English law; and it will equally disregard the *lex loci actus*. Thus in the case of *Van Grutten* v. *Digby*, 1862 (31 B. 561), an English deed settling the wife's property which was made in France, but had no validity there because it had not complied with French forms, was held valid, and the trusts created by it were enforced. Following this case it was held, in *Viditz* v. *O'Hagan* (1899, 2 Ch. 509), that an English marriage-contract executed in Paris was valid, though by the law of the Austrian matrimonial domicile it was void, because not a notarial act; but it was further held by the Court of Appeal (1900, 2 Ch. 87), reversing on this point the

decision of Cozens-Hardy, J., that, since by the Austrian law a husband and wife have a right to revoke their marriage contract, and this right of revocation cannot be waived, the wife had effectually annulled the settlement by a post-nuptial notarial act, by which the unrestricted administration of all her property was vested in her. The English law of the contract could not control an action validly performed under the law of the domicile which modified the contract, unless there were an express declaration to that effect in the original contract making its provisions irrevocable. The wife had no power either before or after her marriage to make an irrevocable settlement, either by the English or the Austrian law; and there being an incapacity to contract irrevocably in the first place, the English doctrine that an infant's contract becomes irrevocable if not repudiated within a reasonable time, did not apply, because the wife's domicile which governed her contractual capacity became Austrian on her marriage.

With the latter part of the decision in *Viditz* v. *O'Hagan* there may be compared the judgment of the House of Lords in *Cooper* v. *Cooper*, 1888 (13 A. C., p. 88), where, reversing the order of the Scottish Court of Session, it was held that the ante-nuptial contract executed in Ireland between an Irishwoman and a domiciled Scotchman, by which the wife purported to discharge her legal rights of *Jus Relictae*, was void, because, by the law of her domicile at the time of making it, the wife was incapable of entering into a contract which was not shown to be for her benefit. The widow was therefore at liberty to avoid the contract, and claim her legal rights as a Scotch widow.

On the other hand, where the wife has capacity to contract, the English Courts will uphold and enforce a marriage settlement made according to the law of a foreign country, though England is the matrimonial domicile, and though the property is in the hands of English trustees. Thus in *Re Fitzgerald* (1904, 1 Ch. 573) the Court of Appeal gave effect to the settlement made in Scotch form of the property of the wife whose

contemplated domicile was Scotch: and further (Stirling, L.J., dissenting), the Lords Justices held that the English trustees of the property were bound to pay to the husband the alimentary provision provided for him thereby, regardless of incumbrances created by him in favour of an English creditor. Such alimentary provision was valid by Scotch law, and the majority of the Court were of opinion that there was nothing in the stipulation of the contract conflicting with essential public or moral interests, so as to make it invalid and unenforceable according to English law. The decision seems right in principle, and is supported by the case of *Peillon* v. *Brooking*, 1858 (25 B. 218), where the English Courts held that a restraint on anticipation annexed to the bequest of income to a married woman by an English will could not be got rid of by a beneficial assignment of the income to the husband, though the law of the matrimonial domicile considered such a restraint altogether invalid. The English Court refused to recognize the assignment, and upheld a restriction good by the law of the English testator's domicile, though invalid by the law of the legatee's domicile. If the English Court upholds a restraint on anticipation in the case of a wife's property, though the law of the wife's domicile treats it as null, it can hardly set aside a restraint on anticipation in the case of the husband's property, as being against the public policy of the law of the domicile.

But where there is no expression or indication to the contrary, the marriage contract will be construed with reference to the law of the matrimonial domicile, which is normally the husband's domicile at or after marriage, though one or even both of the parties to the contract were subsequently or even at the time of making it domiciled in England. In *Duncan* v. *Cannon* (1854, 18 B. 128, affirmed 7 D. M. & G. p. 78), the Courts held that a marriage contract made between a domiciled Scotchman and a domiciled Englishwoman in Scotch forms was subject to Scotch law, and was to be construed by Scotch law, though subsequently to the marriage the spouses had both acquired an English domicile. They held further that the wife

was entitled by the settlement to dispose of a reversionary interest in personalty bequeathed to her by her father in an English will according to the provisions of settlement, though she could not have done so under English law. And where a settlement was made on the marriage of an English lady with a domiciled Turkish subject, who promised to reside in England, the Court held that it was governed by English law as the law of the intended matrimonial domicile (*Colliss* v. *Hector*, 1875, 19 Eq. p. 334), though the husband in fact did not acquire a domicile here.

Where there is no marriage contract, the rights of the spouses *inter se* over their personal property acquired during marriage will likewise be regulated by the law of the matrimonial domicile. Thus in an old case where the spouses were domiciled in Germany, a legacy to a married woman was paid direct by the English Court to her husband, who was entitled to all her personal property by German law [*Sawer* v. *Shute* (1792, 1 Ant. 639)]; and similarly where the spouses were domiciled in Denmark [*Duer* v. *Smith*, 1822 (Jacob 544)]. Conversely, where a married woman, who had originally been domiciled with her husband in Ireland, but who subsequently emigrated with him to New York and established the matrimonial domicile there, was entitled to a bequest which was lodged in Court in Ireland, the Court ordered the fund to be paid to her attorney, because by the law of the matrimonal domicile at the time she could receive a bequest as if she were a *feme sole* (*Re Lett's Trusts*, 1881, 7 L. R. Ir. 132).

Even in countries which make nationality the regular basis of the personal law, the proprietary rights of spouses *inter se* are governed by the law of the matrimonial domicile; marriage is regarded as a contract affecting property or involving an assignment of it; and the law of the place where the contract is carried out determines the effect of that contract, though the validity of the marriage itself depends upon the law of nationality. This is a concession to the will of the parties, who, if they make no special contract for the settlement of

their property, may be assumed to desire to live under that system of law which has sway in the country where they establish their married home. There is good reason for not allowing this system to be ousted by that of another country, supposing that subsequently the domicile is moved by one or both of the spouses. Such a removal may be carried out without the joint consent, and it would be unfair to deprive thereby the unwilling party of any proprietary rights which he or she has acquired, and in the hope of which he or she may have consented to the marriage originally. In England the rule that the law of the matrimonial domicile regulates the patrimony of the spouses forms no exception to the general principle that the personal law depends upon the place of permanent residence deliberately chosen. But it involves a modification of the ordinary law of domicile. The matrimonial domicile in the case of the wife is, in general, that of her husband at the time of marriage, and thus her domicile of origin is ousted as the basis of her personal law; and it is submitted that the matrimonial home may be different from the domicile of origin or from the ante-nuptial domicile of both spouses; and, where it is different, the law of the matrimonial home ousts the law of the former domicile in respect of succession to personal property (cf. *Colliss* v. *Hector*, *supra*).

It is to be noted that there is a rule of English law, which makes a will of a man or woman null and void on marriage; and this law, it has been held, is part of the matrimonial and not of the testamentary law: so that where England is the domicile of the husband at the time of marriage, or is the country of the matrimonial domicile after marriage, the rule of English law will apply to any ante-nuptial will of either of the spouses, and make it of no effect.

These rules of English law are well illustrated by the different judgments in the case of *Re Martin*, *Loustalan* v. *Loustalan* (1900, P., p. 211). The courts in that case had to consider the validity of a holograph French will, formally good according to French law, which had been made by a

Frenchwoman resident in England. She subsequently married in England, without a marriage settlement, a French refugee, lived here with him for a number of years, and after he left her continued to reside here till her death. Jeune, P., in the Court of first instance, and Lindley, M.R., in the Court of Appeal, held that the matrimonial domicile was not English at the time of the marriage, and that therefore the will was good, because its validity was governed by French law as the law of the husband's, and thus also by imputation of the wife's, domicile at that time and at the time of the testatrix' death. But the majority of the Court of Appeal, Rigby and Vaughan Williams, L.JJ., came to an opposite conclusion upon the question of domicile, and accordingly held that the will was bad.

Jeune, P., in the Court of Probate, though he was not of opinion that the matrimonial domicile was English, yet held that there was sufficient evidence to justify the inference that the parties were marrying under the English matrimonial *régime;* but he was of opinion that the English rule as to the revocation of wills by marriage was not part of the matrimonial law, which parties marrying according to that law must be presumed to adopt (p. 223), and therefore the English law only dealt with the property of the spouses, and had no effect on wills which they might have made. Lindley, M.R., in maintaining the validity of the will, put it on the surer legal ground that the domicile of the testatrix was French at the time of marriage, and therefore her will could not be revoked by English law. If the domicile of the testatrix were regarded as English, he admitted that her will must be revoked by the marriage; for the intention of the parties was immaterial. His conclusion was that "the English law applicable to English people, and according to which a woman's personal property formerly vested in her husband on marriage, and according to which her will was revoked by marriage even before the Wills Act, could not on principle apply to French spouses married in England, but (according to English views) domiciled in France when they married." The will therefore was valid in his opinion,

save as to English leasehold property, to which (as not being moveables) the *lex situs* and not the *lex domicilii* applied. Rigby, L.J., on the other hand, while not expressing a definite opinion on the domicile of the husband at the time of the marriage, held that there was sufficient to show that the matrimonial domicile in the contemplation of the spouses was English, and that English law therefore applied to their moveable property, and revoking the will, vested in the husband immediately on the marriage the exclusive right to all his wife's moveables. Lastly, Vaughan Williams, L.J., held that the husband had at the date of marriage an English domicile, and inferred from this that the matrimonial domicile was English. Without such a finding of the husband's domicile, he regarded it as impossible to make this inference, since there was no case "in which an inferred agreement, as distinguished from an express agreement, has been allowed to outweigh the *primâ-facie* inference that the law of the country of the husband's domicile is to govern the moveable property of the married couple."

But it is submitted that on this point Jeune, P., and Rigby, L.J., were right, and that evidence based on conduct would be sufficient to establish in certain cases a matrimonial domicile, which was different from the husband's at the time of the marriage. The marriage in England and the settlement of the spouses in England may be regarded as providing that proof of the *animus manendi* which is necessary for the acquisition of a domicile of choice in the English sense, and which did not exist before the marriage. The learned Lord Justice further held that, assuming there to be a binding marriage contract between husband and wife providing that English law shall determine their relative rights of property, the rule of English law which makes a woman's will null and void on her marriage applied and invalidated the will; and upon this point, it is submitted, he and the Master of the Rolls were right.

Where, however, the testator is domiciled and makes a valid will in a country, the law of which does not effect its

revocation upon marriage, and subsequently after the marriage he acquires a domicile here, the will is entitled to probate. Cf. *In the Goods of Van Faber* (20 T. L. R. 640), where a Dutch subject domiciled in Holland made her will and afterwards married there, and subsequently acquired a domicile in England. The will was admitted because it was good, both at the time it was made and after marriage, by the law of the matrimonial domicile. Upon the same reasoning a will dealing with moveable property, duly executed in England by a spinster domiciled here at the date of execution, was held by the Scottish Court not to be revoked by her subsequent marriage in England to a domiciled Scotchman (*Westerman* v. *Schwab*, 1907, 8 F. 132). Immediately upon marriage the woman acquired the Scotch domicile of her husband, and as the Scottish law did not revoke the will, there was no revocation at any time; and the will good at the time of making remained valid.

It was till recently a question of great doubt, whether in English law, when there was no express marriage contract, the right of succession to property of the spouses could be affected by a change of domicile made during the marriage. The balance of authority seemed indeed to be in favour of the proposition that the change of the husband's domicile would affect the proprietary rights of the wife, and that these were determined by the law of the husband's domicile at her or his death (whichever took place first). The leading case upon the subject was *Lashley* v. *Hog*, 1804 (2 Coop. 456; and S. C. 4 Paton). There Lord Eldon in the House of Lords, overruling the Scotch Court of Session, held that when a native woman of Scotland domiciled in London intermarried with an Englishman, and subsequently the parties removed to Scotland, and the husband was domiciled there at the death of his wife and died there himself, a daughter of the marriage had a claim in right of her mother's *Jus relictae* to a share of the moveable estate of her father. The ground of the decision was that the law which governed the marital rights of the spouses was the law of the husband's domicile at the time of the wife's death. There was indeed

an English marriage contract in the case; but it did not affect the property in question, because it dealt only with the wife's fortune; and the rule laid down by the Lord Chancellor was that a woman's condition as a wife and her rights as a wife were "altered from time to time exactly as her person followed her husband's person from one place of domicile into another place of domicile, till it was at last decided by his death where he left his residence in this world" (p. 483). He found support for this doctrine in two early cases (*Re Foubert's Trust* (1 Br. P. C. 129) and *Freemould* v. *Dedire* (1 P. Wms. p. 429)), in both of which indeed the Courts had held that the law of the place of the marriage governed the disposition of property acquired during coverture, but let it appear that they did so only because of an express agreement to that effect. They seemed favourable in theory to the doctrine that in general the law of the domicile at the time of the disposition should determine the rights.

But in the later part of his judgment in *Lashley* v. *Hog* Lord Eldon makes it clear that, as he understood the English law, it makes no provision for a division of the husband's property on his death, so that there was no implied contract in English law, either in favour of wife or husband upon the consummation of the marriage; hence it was "more consonant to our own laws, and more consonant to the general principle, to say that the implied contract is that the rights of the wife shall shift with the change of residence of the wife, that change of residence being accomplished by the will of the husband, whom by the marriage contract in this instance she is bound to obey." *Lashley* v. *Hog* is therefore in its actual findings a simple case of succession, depending, according to the ordinary principle, on the domicile of the predecessor at death, and not affected by any marriage contract implied by the law of the predecessor's original matrimonial domicile. On the husband's death part of his property devolved by the law of his domicile on his wife and children.

The Scotch law, however, till recently was clear that the law of the domicile at the time of marriage might be ousted

in its regulation of the proprietary rights of the spouses by a change of the matrimonial domicile (cf. *Hall's Trustees* v. *Hall* (1854), 16 D. 1057). Mr. Justice Chitty, in *Re Craignish* (1892, 3 Ch. 180), seems to have assumed that this doctrine would be applied by the English Court in respect of the devolution of the matrimonial property of a Scotch husband and English wife. There he held that the plaintiff, whose domicile of origin was Scotch, had not a good title, *jure mariti* and adversely to the will, to half the property of his deceased wife (an Englishwoman), on the ground that subsequently to the marriage the parties had acquired a fixed English domicile, which continued until the wife's death, and that it was by the English law that the widower's right was to be determined. The case is complicated because at the date of the marriage the husband had no settled residence at all. The question of the immutability of the matrimonial domicile was not apparently argued, the whole force of the case being thrown upon the determination of the plaintiff's domicile at the time of the wife's death.

It might be submitted that, in view of the subsequent decision of the House of Lords in *De Nicols* v. *Curlier* (see later), the judgment is open to question, unless an agreement that the matrimonial domicile was to be English be inferred; since by the Scottish law, which was the law of the husband's domicile on marriage, he became entitled to a definite portion of his wife's moveables, and this was tantamount to a contractual right. On the other hand, it might be urged that the principle of Scotch law at the time was that the marital right was not a complete contractual right, but only an inchoate expectation, which depended for its fulfilment upon the domicile of the spouses remaining Scotch till the death of the wife.

The question is not likely to arise again, since the Scotch Married Women's Property Act, 1881 (44 and 45 Vict. ch. 21), provides that where a marriage is contracted after the passing of the Act, and the husband shall at the time of the marriage have his domicile in Scotland, the whole moveable or personal

estate of the wife, whether acquired before or during the marriage, shall by operation of law be vested in the wife for her separate estate, and shall not be subject to the *jus mariti*. The statute, however, had no application to the Craignish case.

Another case which illustrates the trend of opinion before the decision of the House of Lords in De Nicol's appeal is *Re Marsland* (55 L.J. Ch. p. 581), when it was suggested that the change of domicile made after marriage might alter the proprietary rights of the husband over his wife's moveables. A Manxman married an Englishwoman, and lived with her first in the Isle of Man; by the law of their matrimonial domicile he became entitled to all her moveable property. Subsequently the spouses established a domicile in England; but they returned to the Isle of Man, and while living there, the husband executed a deed of assignment of all his property, including his wife's reversionary interest in a legacy. Later they left the Isle of Man to come back again to England; but the Court held that the Manx domicile was not displaced, and therefore the Manx law prevailed to deprive the wife of her equity to a settlement. Had the English domicile been re-established, the decision, it was suggested, would have been the other way.

The doubts upon the question have been largely set at rest by the decision of the House of Lords in *De Nicols* v. *Curlier* (1900, A. C. 21) reversing the decision of the Court of Appeal (1898, 2 Ch. 60) and restoring the judgment of Mr. Justice Kekewich (1898, 1 Ch. 403). The Court there had to consider the effect of an English will made by a Frenchman, who had intermarried in France with a Frenchwoman without any contract, and had subsequently come with her to England and become permanently domiciled here till his death. There was evidence that by French law in the absence of other agreement the spouses' rights *inter se* as to all their property were subject to the law of "community of goods," and could not be affected by a change of domicile; and the House of Lords therefore held that as to moveable goods, in reference to which the case came before them, the rights of the wife acquired under the French

law were not affected by the change of domicile to England, and that the widow was entitled to the share of her husband's personal estate to which she would have been entitled, if they had remained domiciled in France. The Court of Appeal had held the reverse, basing their decision partly upon the acceptance of the principle adopted in the United States and Scotland that a change of domicile during marriage changed the rights of husband and wife as regards their respective unsettled moveable properties, and partly upon the authority of *Lashley* v. *Hog*.

The Lords, however, preferred the principle adopted in foreign judgments, which held that the law of the matrimonial domicile prevailed over the law of any subsequently acquired domicile in its regulation of the matrimonial property; and, further, they all concluded that *Lashley* v. *Hog* was distinguishable in principle, first because of the cardinal distinction between Scotch and French law, the one giving only a "*spes successionis*," the other a proprietary right to the wife; and, secondly, on the ground that upon an English marriage without express settlement (which was in question in that case) there is an implied contract that the expectations of the wife are to depend on the domicile of the husband, whereas in a similar French marriage, there is an implied contract that the property of the spouses is held in community. The provision made by the French code was as binding on the Court as a written contract made between the parties; and not even a post-nuptial change of nationality could affect the matrimonial system of property.

So far was the principle extended, that, on the summons in the case coming on for further hearing before Kekewich, J., with reference to the testator's real and leasehold properties, that Judge held that these also were subject to the disposition of the community of goods. The English will purporting to dispose of them was invalid, so far as it sought to affect the wife's vested rights. The French law, he held, included in the tacit contract immoveables no less than moveables; and there was nothing in the *lex situs* to prevent the contract being

enforced respecting the freeholds and leaseholds, since the Statute of Frauds did not apply to a contract for a partnership to which in his opinion the community of goods amounted. Upon this part of the decision in the case, there is, however, some room for doubt, as it may be argued that the French law could not tacitly make a contract as to foreign immoveables which must devolve according to the *lex situs;* but it may be that the true interpretation of the English *lex situs* in such a case would involve a reference to the law of the original matrimonial domicile, and thus by the doctrine of *renvoi* reach the same conclusions. In the case of *Welch* v. *Tennent* (1891, A. C. 639), indeed, the House of Lords held that the English law, as the *lex situs*, regulated the character of money representing the purchase-price of English immoveable property, which belonged to a woman who had married a domiciled Scotchman. But there the English law gave the husband a right in the property upon marriage, while in De Nicol's case the English law did not give any right to either spouse, and therefore the foreign law prevailed.

In a recent Scotch case the decision in *De Nicols* v. *Curlier* has been applied to affect the rights of third parties, it being held in the Sheriff's Court at Edinburgh in *Shand-Harvey* v. *Bennet-Clark* (1910, 1 Sc. L. T. 133), that where the spouses were married in Mauritius, and by a written ante-nuptial contract it was provided that there should be a community of goods between them, and later they moved their domicile to Scotland where the husband became bankrupt, gifts of furniture made by the husband to his wife in Scotland did not pass to persons who had purchased from the trustee in bankruptcy all the effects in the husband's Scotch residence; because by the law of the Mauritius gifts to a wife were not revocable. The same reasoning, it is submitted, would apply to a claim made by creditors of the husband on his decease against property which he had given to his wife by a marriage contract embodying the system of community of goods. The law of the first matrimonial domicile, not the law of the

deceased's domicile at death, if that were different, would determine the rights of the parties. We may compare with the English case the decision of the American Court in *Harral* v. *Harral* (51 Amer. Rep. 7), where it was held that the widow was entitled to half the moveable property of her husband, who was an American subject, but had married her and lived with her in France, and subsequently removed to America. There had been no ante-nuptial contract; and the Court found that France was the matrimonial domicile, and that the widow was therefore entitled by the French law of community of goods, which prevailed over a will made by the husband before marriage, whereby he left all his moveables to other persons.

The decision of the House of Lords, however, leaves untouched the general rule of succession illustrated in *Lashley* v. *Hog*, that where there is no ante-nuptial contract, expressed or implied, the rights of succession are determined by the law of the domicile of the deceased spouse at death (which in the case of a wife is the domicile of her husband at the time), and not by the law of the original matrimonial domicile. In *De Nicols* v. *Curlier* and the cases of that class, it was not a question of succession, properly understood, that had to be determined, but a question of rights to property of a marriage, which acted as an assignment, and thereby limited the power of disposition. So far as *Lashley* v. *Hog* decided the question of succession, it is not affected; and the same rule is followed in *Re Hernando* (27 C. D. 284), in *Rea* v. *Rea*—a case of a widow's succession on her husband's intestacy (1902, 1 Ir. 451), and as has been seen in *Re Martin, Loustalan* v. *Loustalan* (1900, P. 211).

To sum up, it may be said that the effect of the special rules relating to the matrimonial property, is that the law of the matrimonial domicile governs the devolution of such property, save in so far as it is ousted by an express ante-nuptial or post-nuptial contract, or by a contract implied by the law of the spouses' domicile at the time of the marriage, and

subject in England to the rule that marriage operates as a revocation of a will made previous to it, where the spouses at the time of marriage are domiciled here. When none of these rules comes into operation, the capacity of married persons both to dispose of and to succeed to moveable property depends on the general principles which regulate the rights of succession.

CHAPTER VII

DEATH DUTIES AND DOMICILE

ALTHOUGH a State allows the moveable property of a foreign subject situate within its jurisdiction to be distributed, either by way of testamentary or intestate succession, according to the personal law of the deceased, it has been pointed out that it interferes to regulate the administration of that property preparatory to the disposition of the beneficial succession. In this administration it includes the imposition and payment of fiscal duties, which the Government levies as a condition of permitting any beneficial succession whatever. These death duties, as they are called, are a comparatively recent introduction into the finance of nations, but, with the ever-growing needs of the State, they are continuously increasing in amount and variety. In this chapter we are concerned mainly with the duties imposed by English law; but it may be said that every European country now makes similar charges upon the property passing on death which is within its jurisdiction; and the object of each legislature being to sweep in as much revenue from this source as possible, it not infrequently happens that the same property is subject to double imposts of the kind, levied both in the country of its actual situation and the country where it is deemed to pass beneficially.

Neither the nationality nor domicile of the owner, nor the situation of the property is recognized as the exclusive basis of the charges, but the availability of the property, either because it is locally or notionally situate in a country or because the successor claims under the law of the country,

renders it subject to the exaction of the fiscal authority. It is claimed with some justification that, as it is owing to the domiciliary State's protection of property that a beneficial succession can take place, the State is entitled to a tax upon the property for the purpose of its general needs. And on the other side it is said that as the personal property was amassed or protected through the help of the State where it is situate, that State has the right to a share on death. In English law the domicile of the deceased, though not the sole, is a material, factor in deciding what duties are payable upon a particular succession; and it is necessary to investigate the subject in some detail.

The original duty imposed by the State in England upon the property of a deceased person was Probate Duty, which was leviable in respect of all personal estate of the deceased, locally situate in the country, or over which the deceased possessed and exercised a general power of appointment by will, without reference to his domicile (cf. *Fernandez Exor.'s Case*, 5 Ch. 314), and over property which was vested in a British trustee, though it was locally situate abroad. It was in the nature of a stamp-duty, and treated as one of the expenses of the collection of the estate: it was relative, therefore, rather to the property itself than either to the deceased or the successor.

Since 1894 Probate duty has been abolished, and in its stead, but partly upon the same principles, what is called Estate duty is levied upon the principal value of all property, real or personal, settled or not settled, which passes on the death of the deceased, and which is situate in the United Kingdom. As Sir William Harcourt said, in introducing the Finance Act of 1894, which enacted the new duty: "It knows nothing of the distinctions of persons who are to be benefited. We deduct the share of the State, and then the persons interested take what remains according to their several shares." That is to say, the duty is a tax on the property as such. The rules which the Courts laid down in respect of liability

to Probate duty apply, *mutatis mutandis*, to the liability to Estate duty, and from these rules the following results appear:—

(1) The domicile of the deceased is immaterial where the property is situate in England: cf. *New York Breweries Co.* v. *A.-G.* (1899, A. C. 62), where it was held that an English company, which transferred the shares of a deceased testator domiciled in the United States to his successor without paying Estate duty, was liable to pay penalties imposed by the Statute.

(2) The duty is leviable upon all personal property which passes by an English grant of administration or is locally situate here, and this includes besides personal chattels in this country (*a*):

(*a*) Negotiable instruments found in the United Kingdom on the death, which are capable of being transferred by acts done here and sold for money here (cf. *A.-G.* v. *Bouwens* (4 M. & W. 171). The same reasoning extends the liability to (*b*) share certificates found in the United Kingdom at the date of the death of which the possession is of practical value (cf. *Stern* v. *The Queen*, 1896 (1 Q. B. 211); and *Re Clark* (1904, 1 Ch. 294)); (*c*) to Colonial bonds to bearer, and to foreign bonds and certificates payable to bearer passing by delivery, and marketable on the London Stock Exchange, which are situate in England at the time of the death (cf. *A.-G.* v. *Glendinning* (1904, 92 L. T. 87), and *Winans* v. *A.-G.* (No. 2), 1910 (A. C. p. 27), both cases decided upon the Estate Duty Act); and (*d*) to scrip issued in England entitling bearer to foreign bonds (*Venables* v. *Baring*, 1892, 3 Ch. 527); and (*e*) debentures of the deceased registered in England (cf. *New York Breweries Co.* v. *A.-G.* (u. s.). But if some act must be done abroad to realize such assets, their locality is deemed to

(*a*) Where property of any of the kinds here set out is situate in England, a grant of the administration to the English assets is necessary, except in the case of moneys received under a policy of assurance in an English company when the deceased dies domiciled out of the United Kingdom. See Ch. IV.

be foreign (cf. *Pearse* v. *Pearse* (9 Sim. 430), and *A.-G.* v. *Dimond* (1 Cr. & J. 386)).

(*f*) Specialty debts of which the deed is situate in the United Kingdom at the time of the creditor's death (cf. *Commissioner of Stamps* v. *Hope*, 1891, A. C. 476). The question whether or not a debt is a specialty is decided by the law of the testator's domicile, and not by the *lex loci* (*Payne* v. *Reg.* (1902, A. C. 553). And apparently all specialty debts owing to any deceased person from a debtor in the United Kingdom are subject to duty (cf. Revenue Act, 1862, 25 & 26 Vict. ch. 22, s. 39).

(*g*) Simple contract debts due to the deceased, where the debtor resides within the United Kingdom, since debts and choses in action are regarded as locally situate in the debtor's country (cf. *King* v. *Sutton*, 1 Wm. Saunders, 274). Even though the debt is secured by a mortgage over land in another country, probate duty was chargeable, and therefore estate duty will be charged, where it would be recoverable here (cf. *Lawson* v. *Commissioners of Inland Revenue* (1896, 2 I. R. 418), and *Payne* v. *Reg.* (1902, A. C. 553), which was a case decided under a Victoria Statute. The Colonial Act is based on ours, and the principle would apply to the English law.

For the purposes of the application of the Mortmain Act as the *lex situs*, a disposition by a mortgage is treated as an immoveable (cf. *Row* v. *Jagg* (1911, 1 Ch. 239), u. s.); but for the purposes of Revenue a debt secured by mortgage of land in a foreign country is treated as a moveable asset.

(*h*) The share of a deceased partner in a partnership asset, when the partnership business is carried on in the United Kingdom (*In the Goods of Ewing* (6 P. D. 23); *Commissioner of Stamp Duties* v. *Salting* (1907, A. C. 449)). But as the share of a partner is held to be situate where the business is carried on, where the property of a partnership was out of the kingdom, though a firm in London were the agents of the partnership and held a mortgage over the assets, which were vested in trustees resident in the United Kingdom, it was held that the

share of a deceased partner was not property situate in the United Kingdom so as to be liable to probate duty (*Laidlay* v. *Lord Advocate*, 15 A. C. 468).

(*i*) Goods on the high seas which can be dealt with here by means of the bills of lading in this country; and goods *in transitu* assigned to this country, which arrive after the death of the deceased (*A.-G.* v. *Hope* (1 Cr. M. Rose 530), and *A.-G.* v. *Pratt* (L. R. 9 Ex. 140)).

(*k*) Moneys receivable under a policy of assurance effected by the deceased with an English company or a foreign company having offices here.

Estate duty is not payable upon immoveable property situate abroad, but where there has been actual or notional conversion of the estate into personalty in the hands of English trustees, the duty is charged. Thus, where there was a trust to convert property situate abroad, and the trustees in the exercise of their discretion postponed the sale, and while it still remained unsold two of the persons entitled to shares of the surplus income died, it was held that estate and succession duty were payable in respect of the survivor's increase of income attributable to the profits of the estate; because notionally it was personal property situate in England (*A.-G.* v. *Johnson* (1907, 2 K. B. 885)).

So, too, when a testator domiciled in England gives immoveable property abroad to trustees domiciled here, on trust to convert and pay the proceeds in certain events to beneficiaries domiciled here, the interest in the proceeds of sale of the foreign property is regarded as an English equitable chose in action, and is, therefore, subject to Estate duty (*A.-G.* v. *Lord Sudeley* (1896, 1 Q. B. 354; and 1897, A. C. 11); and *In re Smyth, Leech* v. *Leech* (1898, 1 Ch. 89)). The House of Lords held in the first case, following Lopes and Kay, L.JJ., that the right of the beneficiary or her executors was not to have a share in the specific foreign immoveables appropriated to her, but to sue the testator's executors for an administration of the estate in England. England being the *forum concursus*, it was the duty

of the administrator of the testator's property in the foreign country to send over the proceeds of sale of the immoveables to the administrator in England, and thus to make them English assets, which could be recovered only in England. Partnership realty, provided the surviving partner is within the English jurisdiction, is likewise impressed with the character of personalty, and on the death of a partner his share in the realty is liable to estate duty (cf. *Forbes* v. *Steven* (L. R. 10 Eq. 178); *Lord Advocate* v. *Mcfarlane's Trustees* (31 Sc. L. R. 357)).

The limits of liability for Estate duty, moreover, extend beyond those which were fixed for probate duty; since it is provided that moveable property passing on the death of the deceased, when situate *out of* the United Kingdom, if under the law in force before the passing of the Finance Act, 1894, Legacy duty or Succession duty is payable in respect thereof, or would be so payable but for the relationship of the person to whom it passes, is liable to estate duty. In effect this provision makes estate duty leviable both on the ground of the locality of the property and of the domicile of the deceased, or the domicile of the legal owners of the deceased's personal property; and, therefore, makes it like legacy and succession duty leviable on foreign personal property, to which succession is claimed by English law. English Estate duty, indeed, is due on all the property which was subject to Probate, Legacy and Succession duty together, and is levied in addition to the two latter in cases to which they apply. Even where the foreign personalty of a testator domiciled here passes under a distinct will and comes under the sole control of a distinct executor, the English executor is still accountable for payment of the whole duty thereon (ss. 6 (2) and 8 (3)).

The incidence of Legacy duty, which is a tax upon interests in personal estate passing on the death of the deceased, depends mainly upon domicile; while liability to Succession duty, which is also a toll on beneficial interests received, so far as it applies to personal property not subject to a settlement, depends on the domicile of the person whose succession passes. Succession

duty, however, is further leviable on successions to real as well as personal property and also upon settled property which is claimed by virtue of English law, and in such cases the domicile of the deceased is immaterial. These two duties are "tolls taken by the Government on the transmission of wealth from dead to living hands"; they are relative to the succession, and not to the property itself.

Legacy duty is levied only upon an interest in personal estate; but though chattels real and moneys to arise from a sale of real estate do not come within that description, it has been held that mortgages secured on foreign land, since the debt is also due personally (*Lawson* v. *Commissioners of Revenue* (1896, 2 I. R. 418)), and the proceeds of foreign freeholds devised on trust for sale (*Re Stokes* (1890, 62 L. T. 176)), and foreign freeholds belonging to a partnership are personal estate for the purposes of charging the duty (*Forbes* v. *Stevens*, 10 Eq. 178). The duty again has been charged in Scotland upon legacies payable out of real estate in England, though the testator was domiciled abroad (*Adv. Gen.* v. *Grant*, 12 Cl. & F. 16). And by a very rigorous interpretation against the legatee, legacy duty was charged upon an interest in a rent-charge coming out of lands in England, which were limited to a person *pur autre vie*. The interest was bequeathed by a testator domiciled abroad, and it was held that the interest was by the Wills Act applicable by law in the same manner as personal estate, and therefore fell within the sphere of the duty; and on the other hand it was not exempt by reason of the testator's foreign domicile, because, though applicable as personal estate, it was not personal estate but realty, which did not follow the person (*Chatfield* v. *Berchtoldt* (L. R. 7 Ch. 192)).

For some time indeed legacy duty was levied irrespective of the deceased's domicile upon all personal estate administered in England (*A.-G.* v. *Cockerell*, 1814 (1 Price, 608); *Logan* v. *Fairlie*, 1825 (2 S. & St. 284); *A.-G.* v. *Beatson*, 1819 (Price, 560)). But the domicile of the deceased was established as the determining factor, though not as the exclusive factor,

in fixing the liability in *Re Ewin* (1832, Cr. & J. 151) and *A.-G.* v. *Forbes* (1834, 2 Cl. and F. 48). Finally in *Thomson* v. *Advocate General,* 1845 (12 Cl. & F. 1), it was laid down that the moveable personal property of a testator domiciled abroad, though situate in the United Kingdom, is not subject to legacy duty; and the decisions in *A.-G.* v. *Cockerell* and *A.-G.* v. *Beatson* (u. s.), which were in the contrary sense, were expressly overruled. The leading case was concerned with the will of a person domiciled in the British Colony of Demerara, which disposed of personal property in Scotland; and the Lords, who had it argued twice before them, were unanimously of opinion that personal property must be regarded as following the domicile of the testator as well for the purpose of legacy duty as for that of beneficial succession.

The same principle was applied to Succession duty in the case of *Wallace* v. *A.-G.* (1865, L. R. 1 Ch. 1), arising out of the will of a person domiciled in France, which disposed of a sum of English Consols. Lord Cranworth, in giving the judgment of the House of Lords, held that the charging clause of the Act which was general must be read subject to some limitation; and the only possible limitation was to "confine the operation of the words to persons who become entitled by virtue of the laws of this country," *i.e.* in the particular case to legatees of persons who had a British domicile. In two earlier cases upon the incidence of succession duty it had been held that it was leviable upon shares of residue left by persons domiciled abroad, so far as they were realized out of assets administered in Great Britain (*In re Wallop,* 1864, 1 De G. J. and S. p. 656: and *In re Capdevielle,* 1864, 2 H. & C. 1985). But the Lord Chancellor distinguished those cases, because they related to testamentary appointments under English instruments, which were necessarily construed by English law and not by the law of the person executing the power; and he disregarded the *dicta* of Turner, L.J., in the first case, which were to the effect that the Act was meant to extend

to cases which could in no way be affected by the rule "*mobilia sequuntur personam*," so that that rule was altogether ousted in its interpretation. "No one," he said, "reading the Act could suppose that, though it had no effect on legatees under the wills of testators domiciled in this country, it yet could by changing the name of legacy into that of succession totally alter the rights of persons claiming title to personal property in this country under the wills of persons domiciled abroad."

The same principle has been applied to Colonial Succession Duty Acts (cf. *Harding* v. *Commissioners of Stamps*, 1898, A. C. 769, and *Lambe* v. *Manuel*, 1903, A. C. 18). Succession duty, however, and Legacy duty are payable upon the personal estate situate outside the country, where the testator dies domiciled here, because the successor becomes entitled by virtue of the English law (*A.-G.* v. *Napier* (6 Ex. 217); *A.-G.* v. *Joel* (*The Times*, February 7, 1900)). Succession duty, moreover, is charged upon succession to real estate, to chattels real and to monies to arise from a sale of real estate in England, directed by will, or to monies charged by will upon real estate here, whatever the domicile of the testator.

Further, it has been established by a long series of decisions that, where the personalty within the jurisdiction passes by a testamentary appointment made under an English instrument, or where the legal interest in the property or fund has been placed in the hands of English trustees, and the beneficial interest is bequeathed by the will, or where the persons are entitled under an English trust or settlement or in virtue of English law, then Succession duty (and now also Estate duty) are payable, though the testator was domiciled abroad, and the beneficiaries may also be abroad. Cf. (*a*) *Re Lovelace* (4 De G. & J. 340); *Re Wallop's Trusts* (1 De G. J. S. 656), both cases of testamentary appointment; (*b*) *Re Badart's Trusts* (10 Eq. 288); *Re Smith's Trusts* (12 W. R. 933); *A.-G.* v. *Campbell* (L. R. 5 H. L. 524): cases of the disposition of funds through English trustees; (*c*) *A.-G.* v. *Felce* (10 T. L. R. 337), where the property was settled by a foreign

instrument, but on the death was invested in the name of trustees resident here; (*d*) *Re Cigalas Settlement* (7 C. D. 35), where the property was settled by an English marriage settlement, though the domicile of the deceased spouse was in Italy, and the property itself consisted of French personalty; (*e*) *Lyall* v. *Lyall* (L. R. 15 Eq. 1), where the funds on which the duties were claimed reached the hands of the English trustees after the succession had taken place, but the right to them had been vested in the trustees before that event; but as to residuary estate which did not reach the English trustees till after the death of the tenant-for-life for whose benefit it was to be invested, no duty was payable; and finally (*f*) *A.-G.* v. *Jewish Colonisation Association* (1901, 2 Q. B. 556 (C. A.); and 1901, 1 Q. B. 123, Ridley, J.), where an enormous fund, largely consisting of foreign shares and bonds, settled upon a charitable association registered in England by Baron de Hirsch, who was domiciled in Austria, was held subject to Succession and Estate duty.

The general reasoning of all these cases is that, where the Courts of this country have to be resorted to in case of need to establish the succession, and where the rights of succession are declared and controlled by English law, the fund enjoys the protection of the English State, and is therefore properly subject to English fiscal dues. The testator, either through his own act or the act of the person who gave him the power of disposition, has definitely chosen to interpose an English trustee between himself and the successor, and has therefore accepted the jurisdiction of a law other than that of his domicile; and for the protection which the property receives from that law, the successor is bound to pay. Putting it in another way, it may be said that the law establishes a domicile as it were for the settlement or other instrument which is the root of this succession, and if that domicile is English, the personal domicile of the testator is immaterial.

It is obvious from this brief statement of the English law that not only are different kinds of death duties imposed on the same property in England on different principles, but also

that double Death duties may readily become payable when the testator is domiciled in, or is the subject of, one country and leaves property in another. For other countries like England impose Death duties, both on the ground of the presence of property within the jurisdiction and of the domicile of the owner in the jurisdiction. Thus in France, though the general law is that succession to personal property depends on the national law of the deceased, if a foreign subject has acquired a domicile in the country, either *de fait* or *de droit*, all his personal property in or out of France is subject to French death duties (Clunet, 1901, p. 142); and again French personal and real property belonging to a deceased foreigner are liable to French death duties, whether he was domiciled in France or not. Indeed, it is conceivable that in certain cases where the nationality and the domicile of the testator and the situation of the property were all different, a treble impost might become due upon the succession to the personalty, since each country might upon a distinct principle enforce its claims upon the succession. Thus if a French subject domiciled in England bequeathed German shares and left personal property in all three countries, the legatees might have to pay claims of the three Governments before they could enjoy the beneficial succession.

In view of this hardship, it has been suggested that States should accept some uniform principle upon which fiscal dues should be leviable, so as to avoid the payment of the imposts of more than one country upon the same succession. As regards the various parts of the British Empire, some provision of the kind is made in Section 20 of the Estate Duty Act, which enacts that where the Commissioners are satisfied that in a British possession, to which this section applies (by reason of the English domicile of the testator), duty is payable by reason of a death in respect of any property situate in such possession and passing on such death, they shall allow a sum equal to the amount of that duty to be deducted from the Estate duty payable in respect of that property on the same

death. The section applies only by Order in Council, and only where there is reciprocal provision in the Colonial law. The exemption, accordingly, is a special indulgence; but it is based upon a reasonable principle, and Continental Jurists and the English Chamber of Commerce have pressed for the international recognition of some general rule extending the scope of the principle.

The Hague Conference of 1900 upon Private International Law, which drew up the project of an international code to settle the law to be applied to succession, did not deal with the question of Succession duties; but it has been proposed at Conferences of the International Law Association, that the State whose law governs the whole succession, and that State alone, should have the right to impose such duties. But as it is unlikely that the nations will all agree upon one principle for fixing the law to govern succession, this solution does not appear hopeful. Secondly, it has been suggested that the country of the situation of the property should in every case have the exclusive right of imposing duties upon the property so situate (cf. Dr. Wittmann's paper read before the International Law Association's Conference, 1907); but Dr. Westlake has pointed out that the greater States are unlikely to assent to such a solution, because the *situs* of stocks and shares which may form a large part of the personalty of their subjects is often abroad, and these States would thus be deprived of a large source of revenue. The remaining solution is that the country of the testator's domicile should have the exclusive right of levying Death duties; and this system, which is accepted by so distinguished an upholder of the principle of nationality as Von Bar, and is applied as the basis of the charge of Death duties in the mutual relations of German States to each other, would seem to be the justest both in principle and in fact. It is the country of the domicile which most often in fact gives the protection to the moveable property of the deceased, and which therefore is entitled to make a charge before it permits succession; and it is the country of the domicile where most regularly

the whole succession is administered. If any solution of the hardship of double Death duties is practicable, it probably lies in a frank acceptance of the principle of domicile as the basis of taxation. But it may be doubted, in view of the ever-growing fiscal needs of the great States, whether Governments will be willing to concede in favour of common logical and equitable principles any claims which they are severally able to impose at present upon personal property of deceased persons within their jurisdiction.

The tendency of recent years has been not towards providing against double duties, but towards the making of treaties between States for the purpose of preventing evasion of Death duties by the notification of the death and information as to the estate of a resident foreigner to his national State. A treaty of the kind was made between England and France in 1907. By the terms of this treaty: "The British Government undertakes to furnish for every person who shall die within the United Kingdom leaving property worth at least £100, but whose residence was in France, an extract of the affidavit containing the name, domicile, date, and place of death of the deceased, information respecting his or her heirs, and particulars of the personal property comprised in the estate; and the French Government undertakes reciprocal obligations to England." So long as Governments are continually looking for new sources of taxation, it is unlikely that they will agree to resign claims which are easily enforced, and which offer the additional attraction of making the foreigner pay.

CHAPTER VIII

THE DOCTRINE OF THE *RENVOI* IN SUCCESSION

In the preceding chapters examples of the application of what is called the *Renvoi* doctrine have been noticed; but the scope and validity of that doctrine must now be considered more closely. The word *Renvoi* means a throwing back, and it is applied juridically to the process by which, when a Court in some country is seised of a case involving the application of the law of a foreign country, it applies the whole law of that country including the rules of private international law therein contained, which may remit the matter to the determination of the *lex fori*. Such complications of jurisdiction arise where two countries employ different principles to determine the law to be applied in the solution of a conflict. The country, *e.g.* of the Court which is administering a succession, may apply the *lex domicilii* to its distribution: but the law of the domicile may apply to such a succession the national law; and if the nationality of the deceased were that of the country administering the estate, we should have an instance of *Renvoi* properly called. If the nationality of the deceased were that of a different country, we should have an instance of what the Germans denote as *Weiterverweisung*, as distinct from *Rück-verweisung*, *i.e.* a passing on as against a sending back of jurisdiction; but though this process is in its nature and in its results somewhat different from the former case, it is commonly known by the same term. The doctrine of *Renvoi*, therefore, may be taken to include all cases where the Court administering a succession accepts the reference of the law of the country (which upon

its own principles of private international law it would apply to the question before it), to the internal provisions of any other law, whether its own or that of another country. Those who oppose the *Renvoi* urge that a distinction should be made between the internal laws of a foreign country and its rules of conflict, and that only the former should be respected by the Court dealing with the succession. The *lex fori*, they maintain, should enforce directly its rules of private international law, and apply the internal provisions of the foreign law, when those rules so direct.

Before considering the theoretical arguments which may be advanced for and against the principle of *Renvoi*, it will be as well to examine the instances of its practical adoption in (*a*) British and (*b*) Continental Courts. In England more particularly law is regarded as a positive science; and the extent to which any principle or rule has been affirmed by judicial decisions is a very important element in judging of its validity. It is therefore noteworthy that almost from the time that questions of conflict of laws in matters of succession came before British tribunals, they have shown a tendency to adopt as the principle of solution the standpoint that the Court should give judgment in the same manner as though it were seated in the foreign country whose law it held to be applicable in the particular case. That is to say, the Court is to apply the whole law of the foreign country in which the *propositus* was domiciled. Thus in the famous suit of *Balfour* v. *Scott*, 1793—which was one of the decisions that helped to establish the rule that succession to personal property is determined by the law of the deceased's domicile—it was laid down as one of the grounds for applying the English law to the distribution of the moveable succession of a Scotchman, that the Scotch law, the *lex fori*, remitted the jurisdiction to the *lex rei sitae*, which was the law of England. As, however, there was in the case a coincidence of the *lex domicilii* and the *lex rei sitae*, it is not clear that the decision of the House of Lords involved the acceptance of the *Renvoi* principle.

So, too, in the case of *De Bonneval* v. *De Bonneval*, 1838 (1 Curt. 857), Sir Herbert Jenner, having held that the deceased was domiciled in France, said: "The *Courts* of that country are the competent authority to determine the validity of the will and the succession to his personal estate." But the English and the French law both agreed that the deceased had a French domicile, so that the application of the French law as interpreted by the French Courts, did not involve any reference back to England.

The *Renvoi* principle is more definitely adopted in the decision of *Collier* v. *Rivaz*, 1841 (2 Curt. 855), where the dispute concerned a will made in English form by an English testator, domiciled in the English sense in Belgium. According to the English law at the time, a will was only valid if made according to the law of the domicile; but as the Belgian law would have held that the testator was not domiciled in Belgium, and that therefore English formalities were requisite and adequate for his will, the English Court, accepting the *renvoi* back to its own law, upheld the validity of the will and granted probate. "The Court sitting here," said Sir H. Jenner, "to determine it (the Belgian law), must consider itself sitting in Belgium under the particular circumstances of the case." The decision has been represented as a straining of the law in favour of the validity of a will made by a British subject in his national form, which was induced by the stringent requirements of the law as it stood before the passing of Lord Kingsdown's Act; and attempts have been made to explain away its authority (cf. Abbott in L. Q. R. April, 1908). But the decision was followed in a number of subsequent cases: *Frere* v. *Frere* (1847) (5 Notes of Cases, 593); *Crookenden* v. *Fuller*, 1859 (1 Sw. and Tr. 441); *Laneuville* v. *Anderson*, 1860 (2 Sw. and Tr. 24); and *Re Brown-Séquard*, 1894 (70 L. T., N. S. 811).

In all these cases the will of an Englishman, well made according to the *lex loci actus*, was held by the English Court to be good—though not made according to the forms prescribed by the law of the domicile,—because that law only required

compliance with the *lex loci actus*. It is urged, indeed, that the principle of these cases is not followed in *Bremer* v. *Freeman*, 1857 (10 Moo. P. C. 356), where a will disposing of English moveables, and made in English form by a testator domiciled in the English sense in France, was held invalid, because to be good it should have complied with the French forms. In that case, however, the Judicial Committee of the Privy Council came to the conclusion that the testator was capable by French law of acquiring a domicile for civil purposes in France without a Government authorization, and that his will was not good in France. So far, then, from being opposed to the theory of *renvoi*, the decision in a way supports it, in that the law of the foreign country to which the English Court referred the determination of the question was looked at in its entirety; and there being by it no *renvoi* to the English law, the foreign law was applied so as to invalidate the will. It is immaterial to the point at issue that the French Courts subsequently held that a Government authorization was necessary, in order that a foreigner might obtain a domicile in France, which would be the basis of civil rights (cf. *L'Affaire Melizet. Sirey*, 1869, pt. 1, p. 138); or that the Privy Council was pressed after the decision in *Bremer* v. *Freeman* to reconsider the case, on the ground that the most eminent French experts were agreed upon a different view of the French law from that adopted by the English tribunal. They refused to do so: and the clear basis of their actual decision was that the deceased would have been held to be domiciled in France by the French Court.

Similarly in the case of *Hamilton* v. *Dallas*, 1875 (L. R. 1 Ch. D. 257), where the question was as to the succession upon an intestacy of an Englishman domiciled in France, the Court (Bacon, V.C.) held that the deceased was capable by the French law of acquiring a domicile for civil purposes without an official authorization, and therefore that his succession was governed by the French law. In these two cases, therefore, no question of *renvoi* arose; but the English Court acted upon the rule, which had been clearly established previously, of looking

to the whole law of a foreign country when a question of succession was referred to that law, and pronouncing its decree in the sense of what it concluded the foreign law, or rather the foreign Court, would determine in the particular circumstances.

All the cases so far considered involved the reference back to English law (the *lex fori*) by the law of the foreign country to which the English Court had submitted the regulation of the succession. But in the case of *Re Trufort*, 1887 (36 C. D. 601), the English Court had to consider the effect of a will made by a testator, born a British subject, who had become naturalized in Switzerland and died domiciled in France. French law, which held the succession to be governed by the law of the nationality, remitted the determination of the validity of the will to the Swiss Court; and the English tribunal, to which application was made for the purpose of enforcing the Swiss judgment, accepted the *renvoi* from France to Switzerland, and gave effect in respect of the English personal property to the adjudication of the Swiss Court. It is urged that this decision is not a genuine acceptance of the *renvoi* doctrine by the English Court, since in any case that Court would have enforced the judgment of a competent foreign tribunal, and the matter came before it not as an open question of succession, but as an instance of *res judicata*. Be this as it may, the decision at least illustrates the habit of the English Courts to apply the law of the domicile which it regards as governing the moveable succession, not in the narrow sense of the internal provisions of that law, but in the larger sense of the whole law including its rules of private international law.

It is to be noted, moreover, that subsequently in the case of *In re Martin* (1900, P. 211), Sir F. H. Jeune remarked *obiter*, that in a case where the domicile of the testator was French according to English law, and English according to French law, he thought it extremely likely (he would go no further) that the English Court would have to apply English law, *i.e.* would have to accept the *renvoi;* and he held definitely in the case before him that in determining the succession of a person

whom he found as a fact to be domiciled in France, he had to assume the position of the French judge in order to fix the domicile of the propositus at a certain period (at p. 217).

It may nevertheless be fairly said that the first case in which the question of the *renvoi* was clearly and definitely before an English Court was *In re Johnson, Roberts* v. *Attorney-General* (1903, 1 Ch. 821), which was tried before Mr. Justice Farwell. The circumstances of the case were peculiar, and a double question of *renvoi* was involved. The testatrix was a British subject born out of wedlock in Malta, who at the age of twenty left that island, and died domiciled in the Grand Duchy of Baden. She was never legally naturalized in the Duchy, and the evidence as regards the foreign law was that, while the will was valid according to the Baden law, the succession to certain personal property of which she had not disposed by will was governed by the law of the country of which she was a subject. The Court held that the moveables undisposed of by will must be distributed according to the law of Malta, and not according to the law either of Baden or of England, and therefore that they went to her next of kin; because by Maltese law the deceased had been legitimated by the subsequent marriage of her parents. It was not indeed pleaded before the Court that Baden's municipal law, as the *lex domicilii*, governed the succession; the Master, who referred the case to the Court, had apparently come to the conclusion that, the Baden law refusing to recognize any domicile unless made with official authorization, and submitting the regulation of the succession of a resident alien to his national law, the English Court was bound to accept the consequent *renvoi*. Farwell, J., adopted the conclusion, and supported it upon several lines of reasoning: (1) That a question arising in an English Court primarily falls to be decided in accordance with the law administered by that Court; so that when the law of the land said to be chosen as the new domicile disregards domicile, and declines to distribute in accordance therewith, there cannot have been any

change of domicile *de facto*, and the case is accordingly remitted to this Court as a case where the *propositus* has intended, but has failed, to obtain an effectual domicile of choice (pp. 827 and 828). (2) The acceptance of the *renvoi* is not any breach of international comity, inasmuch as the English Court makes the distribution not in disregard of, but in compliance with, the Baden law, which rejects the jurisdiction over the moveables of the *propositus* offered to it (p. 830) (*a*). The doctrine of *renvoi* he held not to be clearly established in foreign jurisprudence. Forgo's case, decided by the Court of Cassation in 1875, was thought to have settled the matter in favour of the *renvoi* in France; but it had been subsequently impugned by a number of distinguished jurists, and not followed in several cases; and the English Judge could not find any sure basis of authority on which to found any conclusion.

But accepting on principle the *renvoi* to the national law, the Judge was then concerned to determine whether the distribution of the moveables was governed by a supposed (English) national law, or the law of that part of the British Empire, which the English law pointed to as proper to determine the particular succession. And again by several lines of reasoning, he came to the conclusion that the law to be applied was the Maltese, as being that of the domicile of origin, and therefore the law which the English Court, if originally determining the case, would apply. Like the reference to Baden law, the reference back to English law was regarded in the wider sense as embracing English rules relating to conflict of laws, as well as the municipal English law. At the same time the Judge held that, as the Baden Court did not recognize domicile at all, the law of the deceased's domicile of origin might be applied directly to the succession without any consideration of a *renvoi* to English law.

With reference to this latter line of reasoning, it has been

(*a*) It is said that at this period the law of Baden was opposed to the *renvoi* (cf. Niemeyer, 134); but this fact is immaterial to the reasoning of the decision, which was founded on the evidence, possibly unreliable, that the Baden Courts would have determined the devolution by English law.

cogently pointed out (L. Q. R., April, 1909, p. 145 ff.) that it might easily produce results inconsistent with those which flowed from the adoption of the *renvoi; e.g.* if the nationality of the deceased had been French, the law to be applied to the succession according to one branch of the Judge's finding would have been French, according to the other Maltese. But the second line of argument was not necessary for the Judge's decision, and is not consistent with Lord Lindley's remarks in *Re Martin* to the effect that domicile must be determined exclusively by English law, though the consequences of the domicile when so ascertained may be affected by the foreign law (1900, p. 211, see above). Hence this part of the decision may be treated as *obiter dictum.* On the other hand, the general finding that when English law is applied in virtue of the *renvoi* to the national law, its application is made subject to the limits which it sets to itself, seems to be perfectly sound: and the English law distributing the personal succession of an intestate subject of the British Empire according to the law of the domicile of origin, when he has obtained no other domicile of choice, the law of the domicile of origin is finally chosen to govern the distribution of the personalty of a British subject resident abroad, where the law of his domicile refers back to English law. There is indeed no single English national law, but a choice of laws to be determined in each particular case by the *lex fori.*

The decision in *In re Johnson* has been followed by *In re Bowes* (1906, 22 T. L. R. 711), where Swinfen-Eady, J., held that the will of an Englishman, domiciled according to English law, but not according to French law, in France, was subject to English law, because the *renvoi* from the French to the English law was to be accepted. The case does not seem to have been argued at length, and goes a little beyond what Farwell, J., laid down in *Re Johnson.* There he declared that Baden local law might be disregarded, because it did not recognize the conception of domicile at all as a basis of civil rights. In France, however, that is not the case, but the

French qualifications for a civil domicile differ from the English; and the decision of the Court in *Re Bowes* involves the practical acceptance for a British subject residing in France of the French standard, which becomes the basis of a *renvoi*. The effect of this is to whittle away the English rule that domicile governs the moveable succession; and it might be submitted that the rule which is established by *Collier* v. *Rivaz* and *Re Johnson* does not go further than to maintain that, where the foreign law does not recognize a domicile *de facto* at all, and therefore resigns jurisdiction over the succession to the national law, *i.e.* the *lex fori*, the *renvoi* is accepted. But where the foreign law recognizes a domicile *de facto*, but takes a different view of it from the English, it is not yet clear, in view of what Lindley, M.R., said in *Re Martin* (1900, P. 227), that the English Courts will not apply the internal law of the foreign country to the succession of a person who in its view is domiciled there. As pointed out, however, above, besides the decision in *Re Bowes*, the *dictum* of Jeune, P., in *Re Martin* is in favour of accepting the *renvoi* in such cases.

So much for the English practice in reference to the *renvoi*. In other countries the decisions of the Courts have not been so uniformly in favour of the doctrine, but the balance of judicial opinion has strongly supported it. Thus it was adopted in a matter of testamentary form by the Supreme Court of Canada in the case of *Ross* v. *Ross*, 1893 (25 S. C. Rep. 307). The Court was concerned with the succession of a merchant domiciled in Quebec, who, while on a visit to New York made there a holograph will, good formally according to the law of Canada, but not according to the local law. It was held that the will was valid. The majority of the Court were of opinion that the rule, *locus regit actum*, which the law of Lower Canada applied to wills, was not imperative but permissive only; but even if the rule did apply, the will was valid, because it appeared that by the law of the State of New York, the will would be considered good as to moveables wherever situate, having been executed according to the law of the testator's

domicile, and good as to immoveables in Quebec because well executed according to the *lex situs*. Taschereau, J., in an elaborate dissenting judgment, opposed the theory of *renvoi*, but he took up the extreme position of denying entirely the applicability of the rule of Private International Law on the subject.

In the United States again, the English doctrine of applying the whole law of a foreign country where reference is made to it by the *lex fori* was adopted in what appears to be the only reported case in which the question was raised: *Dupuy* v. *Wiirtz*, 1873 (53 N. Y. 556). This case, which came before the Appeal Court of New York, dealt with the will of a citizen of New York who had lived in France a number of years, and made his will in that country, bequeathing both real and personal property in a form recognized by the law of New York, but not by the French law. It was argued that the testator had obtained a domicile of choice in France, and that therefore his will was bad, because not executed according to the law of his domicile. The Court, indeed, came to the conclusion that he had never lost his domicile of origin, and that therefore the will was clearly good; but one of the judges declared *obiter* that, as by the law of France the deceased would have been regarded as still domiciled in New York, because he had not obtained an authorization from the Government, therefore the validity of his will would be judged by the American law and the question of domicile was immaterial. He approved the statement of Dr. Lushington in *Maltass* v. *Maltass* (1 Rob. Eccl. 72): "By the law of the domicile as applied to succession is meant not the general law, but the law which the country of the domicile applies to the particular case under consideration." The opinion tallies with that given in *Re Bowes* (u. s.).

It has been represented that the case of *Harral* v. *Harral* (51 Amer. Rep. 17) contains a rejection of the doctrine of *renvoi* (Abbot in L. Q. R., *loc. cit.*); but the report does not bear out this interpretation. The plaintiff was the widow of an American

subject, whose domicile of origin was in Connecticut, but who had married her in Paris after living there several years, and continued to live there with her. Subsequently he was sent back to America to a hospital for the insane, where he died. There had been no ante-nuptial contract, and the widow claimed that by the French law she was entitled to half his moveable property, though by a will made before marriage he had bequeathed the whole of it to others. According to American law the matrimonial domicile was French; but for the legatees it was argued that the deceased was not domiciled in France, because he had never obtained an official authorization, and that therefore the French marriage law did not apply. But the Court held that for the acquisition of a matrimonial domicile such authorization was not necessary, and that therefore both by French and American law he was domiciled in France, and that the widow was entitled. There being no conflict upon the question of domicile, the *renvoi* point did not arise. But the Court gave indication in its judgment that it would determine the matter as if it had its seat in France, which is the attitude that leads to the adoption of the *renvoi*. The doctrine was argued at great length in a recent case before the Supreme Court of the State of New York; *In re Hart*, 1910 (see Clunet, 1911, p. 22); but no decision upon it seems to have been required for the judgment in the case.

Turning to another Court where Anglo-Saxon law is administered, the Supreme English Consular Court in Egypt has in recent years given a decision which directly applies the *Renvoi*. In *Re the Goods of William Torrey Grant*, 1907 (Law Mag. and Rev., 1909, p. 297), it held that the law to be applied to the succession to the real estate situate in Egypt of an intestate who died there, but was domiciled in Scotland, was the Mussulman law of inheritance. By article 77 of the Mixed Court Code, successions are regulated according to the law of the nation to which the deceased belongs; and the Court, in interpreting the article, held that the British law to which reference was made applied in its fulness; and as its rule that

the *lex situs* regulated succession to real estate submitted the matter to the local law, the Court was bound to apply that law. The decision had been impugned, indeed (by Mr. Sanderson in the Juridical Review, Vol. XX.), on the ground that the Mussulman law of inheritance was not meant to apply to British residents, and that, therefore, the Court should have been astute to find some reason for applying the internal provisions as to succession of the law of the domicile of origin. Undoubtedly this might have been done upon the construction of the article in the Mixed Code ; and the course was in fact adopted subsequently in the case of *Re Dale*, *Dale* v. *Dale*, 1910, where the same Court had to consider the succession to real estate in Egypt, which the testator, who was an English subject, had devised in trust for his wife and children.

It was argued on the strength of *In re Torrey Grant*, that the disposition was invalid, and that the land should devolve according to Turkish law. The Court, however, held that the meaning of the law of the Mixed Civil Code was that an English subject could dispose by will of all his property in Egypt according to the English internal law, and that therefore the will was valid here, and no questions of *Renvoi* arose. This finding accords with the decision (unreported) of Farwell, J. in *Re Baines*, mentioned by Professor Dicey (*op. cit.*, p. 723), to the effect that the will of an Englishman disposing of real estate in Egypt, and valid according to the law of England though not according to the local law, was good, on the ground that the Egyptian Court in the circumstances would have held the succession to be governed by English law. This English decision is an example, then, of the acceptance of the *Renvoi ;* and illustrates the effect of such acceptance in producing agreements between the judgments of English and foreign tribunals *in pari materia.* Even the opponents of the doctrine of *Renvoi*, however, admit that it is perfectly legitimate when it is applied to countries where consular jurisdiction is still maintained by the European powers (cf. M. Bartin, vol. 30, Revue de Droit Intern., pp. 283 ff.).

Turning now to the practice of Continental countries, where the doctrine has been endlessly debated by jurists, the principle of the *Renvoi* was for a time firmly established in France by a decision of the Court of Cassation in 1875 in the "Affaire Forgo" (which was upheld and followed by judgments of the same tribunal in 1876, 1878, 1880 and 1882). In the Forgo case it was held that where an Englishman died domiciled in France, and by the French law the succession was subject to English law, but that law referred the disposition of the succession to the French law as the law of the domicile, the French Court would accept the reference and apply its own provisions. The basis of the rule was stated in 1882 to be that "the application of the French (internal) law in such a case is the sole means of not violating the foreign law" (Dalloz, 1882, 1, 301). A number of French tribunals, disregarding the protests of many distinguished jurists, followed the practice of the Court of Cassation; and only in a few cases, which may be regarded as special exceptions, was the opposing view upheld. Judicial decision is not binding to the same extent in France as in England, nor is justice as centralized, so that uniformity of practice in the various Courts is not to be expected.

In 1905, however, the Court of Appeal in Paris definitely broke with precedent, and in a case which concerned the succession to the personal property of a person born in the American State of Louisiana, but domiciled and dying in France, applied the law of Louisiana, though that law referred back to the French law (L'Affaire Soulie). In other words, the Appeal Court definitely rejected the *Renvoi;* but after a long delay the suit was finally brought before the Chambre de Requêtes at Paris upon this point; and in 1910 that tribunal reaffirmed the old practice of accepting the *Renvoi*, and reversed the finding of the lower Court. The judgment of the Court was very laconic, and did not contain any long discussion of the arguments for and against the *Renvoi;* but it declared briefly: "The French Private International Law does not suffer in any

way from the *Renvoi* which is made to the French internal law by the rule of the foreign Private International Law. It is entirely to the good that all conflicts are thus suppressed, and that the French law can thereby regulate according to its own views interests of property which have their origin on French territory. Accordingly the moveable succession of a stranger dying in France can be regulated by the French law, so soon as the law of the foreigner refers in such a case to the law of the domicile." (Cf. Clunet, 1910, p. 585 and pp. 888 ff.)

Shortly before this decision was given, the doctrine of the *Renvoi* had been more elaborately upheld by the Tribunal Civil de la Seine in a case involving the succession to the property of an Englishman who died domiciled according to the English view in France (*Drovet et Péroville* v. *Kilford*, Clunet, 1910, pp. 577–585). The point at issue was whether French or English internal law governed the succession to the property of spouses, which was subject according to English law to a French contract of marriage, and therefore to French legal dispositions. The French Court, in accepting the *Renvoi*, declared that it was unreasonable to separate the rules of private international law from the rest of the English law when reference was made to the English system; so that when those rules sent the matter back to the French system, the French Court was competent to apply its own provisions. The Appeal Court of Paris upheld the decision; and in view of this consensus of the highest tribunals, it is not surprising that the learned Editor of the *Revue de Droit International Privé* should comment that upon the question of *Renvoi*: "Les praticiens sont fixés." Jurists and theorists continue their opposition to the doctrine, but those who are concerned with the practical administration of the law seem to be incurably affected with a predisposition in its favour, and to find in it an acceptable solution for the conflicts caused by varying systems of private international law.

In Germany, after having found acceptance in several

decisions of the Courts (cf. a decree of the Court in Lubeck, 1861 (Seyffert 14, No. 107)), but having been rejected in the preponderating number of cases, the doctrine of *Renvoi* received a wider and more permanent acceptance by an enactment of the German Civil Code of 1900. There it is declared in the General Provisions (Articles 7 and 27), "The capacity of a person is to be judged according to the law of the State to which he belongs (7). . . . If by the law of the foreign State of which the laws are declared by Article 7, etc., to be applicable, the (internal) laws of Germany are to be applied, the latter shall be applied." Therefore the *Renvoi* from the national law to the law of the domicile, if that law is the German law, is to be accepted for purposes of succession.

In Belgium, Italy and Spain (according to the figures furnished by Dr. Pawley Bate in his "Notes on the Doctrine of Renvoi," pp. 24 to 26, and by Weiss in his "Droit International Privé," vol. 3, p. 81), the doctrine had been accepted in most of the cases where it was involved down to the year 1901.

Lastly, it may be noticed that in a recent case about a succession to the personal property of an English subject dying in Portugal, the *Renvoi* principle was definitely accepted by the Appellate Court of that country (cf. Clunet, 1908, p. 367). An English widow by her will left one of her two daughters her universal legatee; while by English law this was a valid disposition, by Portuguese law she could only dispose freely of one-third of her property. Portuguese law refers succession in general to the national—in this case the English—law; but the English Courts would have applied Portuguese law to the particular succession, and the Court accordingly held the will invalid. It rejected the distinction which was alleged to exist between the internal and the Private International law of a country, because, as it held, the one permeates the other, and the two form an indivisible whole which must be observed in relation to the personal statute of the individual. That is to say, the English law as a whole declaring the woman's property

subject to the Portuguese system, the reference to English law involved the recognition of the applicability of the Portuguese law of succession.

It may be pointed out, moreover, that at the Hague Conferences on Private International Law of 1900 and 1904, which drew up a Convention on Marriage Law, the rule adopted for the validity of marriage contains a partial acceptance of the *renvoi* principle. It is provided that the right of contracting marriage is determined by the national law of each of the parties intending to be married—unless such national law refers expressly to some other law. Accordingly a country which makes nationality the criterion of the validity of marriage would nevertheless have regard to the disposition of the national law of the spouses, which should hold the marriage valid if properly entered upon according to the *lex loci celebrationis.* The provision shows the general tendency of Continental opinion; and though the considerations which appertain to the law of marriage and succession are somewhat different, it is submitted that regard for the disposition of the foreign law to which reference is made in the actual case is the rule which international practice is coming more and more to favour.

The Jurists may speak of "the few partisans who still support the *Renvoi* doctrine" or of "the rejection of the doctrine being in consonance with the modern theory;" but the judicial decisions of the last few years, no less than the tendency of national and international legislation upon the subject of conflict of laws (witness the German Civil Code and the projected code of the Law of Marriage) give a clear and steady support to the doctrine. Hence it may be said to-day, with even more justification than it could have been said thirty years ago, that the *Renvoi* doctrine has at its back the *consensus gentium,* which is required to make a new rule part of the law of nations.

If the practice of recent years in relation to the *Renvoi* speaks almost with one voice, the theorists are much more divided in opinion. And during the last thirty years, the

subject has been one of continual discussion among them. The most noteworthy expression of opinion was made at the meeting of the Institute of International Law in 1900, when the distinguished German publicist, Von Bar, presented to the Conference two theses, which provided for a limited *renvoi* as follows: (1) Every tribunal shall observe the law of its country in what concerns the application of foreign laws; (2) Provided that if there is no express disposition to the contrary, the tribunal should respect (*a*) the disposition of a foreign law which disclaims the right to bind its nationals abroad in respect of their personal statute, and desires that this personal statute shall be determined by the law of the domicile, or even by the law of the place where the act in question has taken place; (*b*) the decision of two or more foreign systems of law, which, in a case where it is certain that one of them is necessarily competent, agree in attributing the decision of a question to the same system of law. The converse and supplement of Von Bar's rules, which it is submitted is equally reasonable, is that a State should exercise authority over its subjects domiciled abroad, when the law of the domicile does not accept authority over them.

The more limited proposal, however, that the *renvoi* be accepted when the national law referred back to the law of the domicile, or contained a further reference to another law,—*e.g.* the law where the will is made, and that law likewise makes the validity of the will depend upon conformity with its own provisions—did not secure a majority of the members of the Institute; and the principle of the *renvoi* was condemned by twenty-one votes to six. Of the English jurists, Professor Holland voted with the majority, Professor Westlake with the minority, at the Institute meeting. Dr. Pawley Bate and Dr. Baty have also written in opposition to the *Renvoi;* whilst Professor Dicey, after some doubts, has in the second edition of his Conflict of Laws, arrived at the deliberate conclusion that the English Courts do virtually accept the doctrine (cf. Appendix, Note 1, p. 715). To state the doctrine again in

regard to the special subject of succession, when the English Court refers the distribution of a succession to the law of a foreign country, it takes into account the whole law, including the rules of private international law, which it contains; and if the effect of those rules is to remit the determination of a succession to English law, the Court will apply the English law of succession to the case. This, it is submitted, is not only the course which is marked out by precedent as correct, but which is on grounds of principle and on grounds of expediency equally sound.

The question of the *Renvoi* in cases of succession may be treated by itself, apart from the doctrine in relation to other matters, *e.g.* marriage and divorce; since the rules of private international law in regard to moveable succession have a special object, for the attainment of which the adoption of the *Renvoi* is important. That object is to secure a unity in the distribution of the succession, so that the whole of the moveable estate of the deceased, at any rate, though situate in several jurisdictions, may be distributed on one system and subject to one law. It is to this end that the law of each country has resigned its claim to regulate the distribution of property which is found within its territorial jurisdiction. In the eighteenth and in the first half of the nineteenth century, the law which was by the general consensus regarded as having the right to regulate the moveable succession was that of the deceased's domicile. To that law the Courts of every country in which part of the deceased's moveables were situate regularly deferred, unless there was something in it which it regarded as contrary to its own public policy, or unless there was some express provision in its own system which ousted that law, as, for example, a rule that a will was valid if made in the forms required by the *lex loci actus*. During the last sixty years, indeed, the old and well-established principle of the law of nations in respect of succession has been largely infringed by the introduction of the principle that the national law prescribes the personal status, though the subject has adopted

a foreign domicile. But the desire to avoid the application of conflicting systems of law in the disposition of the same personal succession is still as strong, and is the motive still underlying all private international law.

Now, if each country applies its own rules of private international law rigidly in the administration of a succession, without regard to the rules of the foreign law to which it may refer the disposition, this desirable end, which, be it remembered, is the practical object of those rules themselves, will be defeated. Suppose, for example, an English subject, who according to English but not according to French law is domiciled in France, dies in that country intestate, leaving personal property there and in England. The French Court administering his personal estate, and holding that the English, as the national, law applied to it, will distribute the personal property in France according to the English Statute of Distributions. The English Court, administering the personal estate in England, and holding that the French law as the law of the domicile applies, will distribute it to the persons entitled by the French law of intestacy. That is to say, each Court will apply the foreign law in its own despite, and thus bring about an artificial chaos in the succession. Suppose, however, that either the French Court or the English Court accepts the *Renvoi* from the law of the foreign country, and distributes the estate within its jurisdiction according to the provisions of its own internal law; then the unity of the system of the succession will be preserved, and the French or the English Court will apply its own law with the consent, or rather by the invitation, of the foreign law to which it desired to defer.

But, it may be objected, if the *Renvoi* principle is good, it ought to be applied fully, and if so applied in such a case, both the English and French Courts should adopt it, and the result would be the reverse confusion to that involved by the rejection of the *Renvoi*. The French Court, accepting the *renvoi*, would apply French law; the English Court on the same grounds

would apply English law to the succession. The objection, however, is a figment of theory, and is not based on a solid practical difficulty. Even if no rule were established by an international convention for the application of the *Renvoi*, in any particular case the English Court or the French Court would know whether the other had already dealt with the succession. If this were so, it would adopt the principle already applied to the succession, and apply either its own rules of private international law or the doctrine of *renvoi* so as to subject the whole moveable succession to one law. Thus in the case supposed, if the English Court, first seised of the matter, had accepted the *renvoi* and applied English law to the English assets of the deceased, a French Court would naturally apply English law to the French assets according to its own rules. There are, indeed, to-day conceivable cases in which the acceptance of the *Renvoi* might lead to conflicting principles of disposition. But if rules on the lines presented by Von Bar were adopted by all countries to govern the *Renvoi*, these possible chances of conflict would be taken away, and the limited *renvoi* therein provided for would ensure the application of one principle of succession in every case, where part of the moveable property was situate in a country which made domicile, and part in a country which made nationality, the basis of the personal status.

The straining of theory and the disregard of practice again account for the objection to the *Renvoi* that it involves an endless series of references which can never be resolved. The law of the domicile, it is said, to which the *lex fori* submits the succession, refers the matter back to the law of the nationality, which coincides with the *lex fori*. As the original submission of the *lex fori* was to the whole law of the domicile, so the reference back is to the whole law of the nation. That law returns the matter to the whole law of the domicile, and so the legal game of battledore and shuttlecock goes on endlessly, as neither country will accept jurisdiction. The obvious answer to this objection is that in practice it does not happen,

and that the Court accepting the *renvoi* has always, so to speak, held the shuttlecock at the first return, and applied its own internal law to the succession, understanding the *renvoi* to amount to a reference to its internal law. The "infinite series" is another figment of the theorists' imagination.

But to the theoretical objection another answer may be given, which goes more thoroughly to the root of the problem. The *Renvoi* is *in principle* a reference back not to the whole law of the foreign country including its different rules of Private International Law, but simply to its internal law. Suppose a case where the *lex fori* (hereinafter called A) submits the matter to the *lex domicilii* (B), and B refers the matter back to A as the law of the nationality. A accepts the *Renvoi*, and applies its own law. If we regard first principles, we see that what has happened is this. Law is primarily sovereign over all matters occurring within the territory, and so A would ordinarily apply to the succession. A from motives of international comity and to secure a single system of succession, resigns its ordinary jurisdiction to B. But B, by reason of its special juristic conceptions, does not take advantage of the sacrifice or accept jurisdiction. A's primary jurisdiction consequently is properly exercised, and there is no ground for A to decline to accept the renunciation of B, since it thereby puts into operation its fundamental principle of regulating every matter within the territory.

But, it is objected to this, it is a violation of A's sovereignty that it should apply its own legal provisions at the bidding of B. A must decide its own limitations for itself. To this it may be replied, first, that A is not acting at B's bidding. Private International Law is in its very essence a "Science of Sacrifice" (cf. Pillet in the Annuaire de l'Institut de Droit International, 1900, p. 149). The whole purpose of the offer of the *lex fori* not to apply its own internal law to the succession was that it should not offend the foreign sovereignty. When it is assured by that law that this result will not happen

if it applies its own provisions, it has a clear right to resume full sovereignty over the affair. As Professor Westlake put it in the course of the same discussion, the foreign law properly "ne renvoie pas: elle ne fait que se désintéresser (*a*). It is a far-fetched way of describing the process to say that the foreign law prescribes the limits of the sovereignty of the *lex fori*, when what really happens is that the foreign law disclaims the desire to exercise jurisdiction. It is surely "supernational" to compel the foreign law to exercise the disposition which it refuses; and in respect of the rules of private international law it is least fitting that an extreme national standpoint should be taken up.

Foreign jurists, indeed, are hostile to the theory that the rules of Private International Law are part of the comity of nations. In the report of the Institut upon the Conflict of Laws presented in 1892, the comity theory is referred to as "an historical souvenir absolutely anti-judicial, and completely abandoned in science and practice." But, even if we take up this standpoint, and regard the rules of Private International Law in any country as part of its positive law in as full a sense as its internal law, the *Renvoi* principle, it is submitted, should be admitted and regarded as part of those rules; and therefore its acceptance would be the acceptance of a rule of the municipal law which is applied, rather than a submission to a foreign law. The acceptance is necessary to secure a beneficial and reasonable operation of the other rules of Conflict, and to meet the difficulties caused since the rules were originally established by the existence of conflicting bases of jurisdiction in various States. Thus it would be a reasonable and beneficial operation of the Conflict in the case of England,

(*a*) It is interesting to note that a French Court, the Civil Tribunal of Lille, gave a judgment adopting this position concerning the succession of an Englishman dying in France, in the case of *Walker* v. *Walker*, 1898. (See Clunet, 1911, p. 437.) The Court declared that as regards moveables: "la loi française se désinteresse des meubles appartenant à un étranger de même que de sa capacité d'en disposer; qu'il n'existe en effet dans notre legislation aucune disposition relative à cette matière . . . ."

if our Courts accepting a *renvoi* were to apply the English law of succession to the estate of a British subject dying intestate in France and domiciled there. "*Cessante ratione legis, cessat et ipsa lex.*" The reason of the rule which directed that the law of the domicile should regulate the whole of the moveable succession was to secure a unity of succession; when that object is no longer attained by the application of the rule, but on the other hand may be attained by the application of the *Renvoi*, it is right that the old rule should be corrected or supplemented by the new doctrine.

It is said again that the *Renvoi* is "a denial of Private International Law and of the internal autonomy of States." By this apparently is meant that where a Court accepts the *renvoi*, it puts into force the principle of a foreign country for settling questions of conflict, and renounces its own principle. Thus in a particular case the English Court might apply the law of the nationality in place of the law of the domicile to the moveable succession of a person who died abroad (cf. *Re Trufort* and *Re Johnson*). But to this it may be answered (1) that the *renvoi* is applied by way of exception, and, as already remarked, to secure the practical object for which private international law was designed; and (2) that it is a more serious denial of the autonomy of States to compel the operation of a foreign law upon a matter where it refuses to apply itself, than to apply the municipal law because the foreign law refuses jurisdiction. For example, if a French Court were to apply the English statute of Distributions to the intestate succession of an Englishman dying domiciled in France, it would be really misapplying the English law to a case where the English legislator never meant it to operate. Like most of the objections to the *renvoi*, this argument against it is purely academic, based entirely on theoretical premises, and entirely regardless of practical consequences. And even on the ground of the pure theory of sovereignty, it may be pointed out that an English Court has no right to assume sovereignty, and decide what part of the foreign law is to be applied, when the

person whose succession is in question is not subjected to it either *ratione personae* or *ratione territorii*.

When, therefore, a person dies domiciled in France, the English Court, which *ex hypothesi* does not claim to attach the personal statute to him, would be usurping sovereignty, if it held that the French internal law must be applicable to the moveable succession—though the French law would not apply its own provisions to the case. Its regard to French law must be complete, and *vice versâ*. When the English Court is concerned with the succession of a person domiciled in one of the colonies, the judge has to place himself in the position of the judge of the domicile; and it is reasonable that he should take up the same standpoint when concerned with the succession of a person domiciled in a foreign state. So too where a foreign Court has already pronounced on the will or the succession, the rule is clear that the English Court will follow its ruling, though it is based upon a different principle of Private International Law from that which the English law would have applied in the first instance (cf. *Re Trufort*). And the same respect should be paid to the foreign law where it has not actually been applied to a particular case by a decree of the Courts; but would be applied if action were taken there. The common, and, it is submitted, the correct, principle which may be considered to underlie all the cases is that an English Judge should decide the question as if he were seated in the Court of the domicile.

Professor Asser of Holland has pointed out that a scientific system of Private International Law would name directly the law to be applied to any particular case of succession, and would not leave it to the law of each country to dispose of the matter upon its own lines. The Hague Conferences upon Private International Law have laid down the first steps of such a scientific system; and it may be expected that before long a truly international code may be drawn up for settling all questions of conflict in respect of succession upon uniform principles. But until an international convention is substituted

for national law, the *renvoi* principle offers an excellent means for extending conventional law to the greatest possible number of States, and eliminating the grave difficulties which actually result from the divergence of national laws. A convention, Dr. Asser urges, embodying in part the principle of *renvoi* should be concluded between the countries which accept the national principle and those which accept the domicile principle. The rules proposed by Von Bar would form the reasonable basis of such a Convention. In the meantime, the practice of judges in the different countries may be counted upon to enforce a doctrine, which, it is submitted, is at once calculated to produce the most equitable practical results, and is in accord with the fundamental principles of legal sovereignty in general, and of Private International Law in particular.

CHAPTER IX

THE VALIDITY OF THE PRINCIPLE OF DOMICILE IN SUCCESSION

In the first chapter there was traced the rise and decline, as it were, of the principle of domicile in its relation to succession; and it was seen that it still remains the regular basis of the personal law in England, though its application is largely modified: partly by statute and judicial decision, and partly by the doctrine of the *renvoi*. In foreign countries again, it has largely been supplanted by the law of nationality; and the effect of the existence of these two conflicting principles has been to reintroduce confusion into the law of succession to a person who dies leaving personal property in more than one jurisdiction.

It is argued by several English jurists of eminence that, in order to secure a uniform practice among the nations, England should give up her present rule, and adopt with most of the Continental States the principle of nationality; and it is said with some show of reason that her judges' recent interpretation of the law of domicile approximates so closely to the doctrine of nationality that the change would be more apparent than real (*a*). But a number of cogent considerations may be advanced against the proposed change.

(1) The United States and several continental countries still adhere to the old principle of domicile, and there would be no gain in our renunciation of it unless they at the same time made a similar change, and there is little probability of a

(*a*) See Chapter I. p. 27.

unanimous adoption of the national principle. At the Conference of London, 1908, which endeavoured to draw up a Code of the law of Maritime Capture in War, England expressed her willingness to give up her doctrine of domicile as the basis of enemy character, and to accept in its place the doctrine of nationality, but the unwillingness of other powers—especially the United States—to make a similar change rendered her offer useless.

(2) The national principle admittedly does not cover all cases in the countries where it is the regular rule: since there are persons who have a double nationality, and others who cannot be regarded as the nationals of any country. Thus the German Civil Code invokes the principle of domicile to regulate the personal law when the nationality is unknown (Article 8); and the Institut de Droit International had earlier proposed in 1881, that where a person had no known nationality, the succession should be determined by the law of the domicile. The principle of domicile must therefore be retained for certain cases; and as it is capable of meeting all cases, it is more reasonable that it should be developed so as to harmonize with modern ideas of the State's connection with its subjects, than that it should be swept away and replaced by another principle, which cannot be comprehensive.

(3) Within the British Empire and likewise within the United States, the principle of domicile is thoroughly and necessarily applied to determine the system of succession. There is, in fact, no national law of succession in either of the great Anglo-Saxon States. And while it is conceivable that these countries should adopt a principle for the succession of their subjects living abroad, or for foreign subjects living in their territories, different from that which they apply to the succession of their subjects living within the dominions, such a course would not be logical, and would be opposed to the principles of the Common Law.

(4) The principle of domicile harmonizes better with, and is more adaptable to, the idea of the freedom of the individual

to determine his own system of law than the principle of nationality; and that idea underlies the development of Private International Law during the last century, at least in this country.

(5) Finally, and the most important reason of all, the principle of domicile, it is submitted, as the criterion of the law to govern personal succession, is based on more reasonable and permanent grounds than the principle of nationality. The domicile, in the sense in which the English Courts have interpreted the term, is the centre voluntarily chosen of a man's affairs, the seat of his interests and his affections. It is there his character develops, it is there where his manner of life is moulded, it is there where he regularly carries out the actions of his juridical life. It is, then, to the law of this country that it is more natural to assume that he desires to submit himself; and just as he will primarily make his contracts, during his lifetime, in accordance with that law, so it is reasonable that he should dispose of his succession in accordance with it; and in default of his making a definite disposition, that he should leave it to that law to regulate the devolution of his property after his death. The exceptions already introduced by English law into the application of the law of the domicile to moveable succession, which allow the forms of a will to be regulated by the law of the place where it is made, or by the law of the domicile of origin as well as by the law of the domicile at death, are formulated on good reason. In a revised and universalized law of domicile they would be retained and in several instances extended; *e.g.* by providing that a will should be formally good if it satisfied the *lex loci actus;* and that a married woman should be able to acquire a separate domicile from her husband, if in fact living separated from him; but it is submitted that by this modified acceptance of the domicile standard, we should obtain a more valid principle of jurisdiction than by the rigid application of the national law.

When a citizen has left his own country and definitely

thrown in his lot with another country, as would be shown partly by his general conduct, and partly by the duration of his settlement there, the claim of his national law to regulate his succession on death, though it does not claim to control his capacity to contract during his life, seems to be an unwarrantable extension of the exterritorial power of the legal sovereign. It must be admitted, on the other hand, that the doctrine of domicile, as it was formerly interpreted in foreign countries, did not provide a satisfactory basis of jurisdiction. Mere change of residence should not involve a change of the law governing personal rights. The continental notion of domicile in many cases was much looser than the English, so that the need was felt for a more stable criterion, and in the fervour of national sentiment, nationality was adopted. But the English doctrine, with its emphasis on the domicile of origin, provides a much sounder and more stable criterion.

It may be doubted, indeed, whether either principle is likely to secure universal acceptance in the future. There is a radical cleavage in political outlook which corresponds with the divergence in legal principle, and which cannot be eliminated. On the one side are the countries which favour the extension of State control over the subject; on the other, those which favour the liberty of the individual within the State. In this divergence of outlook it is likely that harmony will be secured rather by an international convention delimiting the spheres of each principle, so as to secure unity of succession in any particular case, than by the attempted establishment of a single principle in all countries.

A project for an international law to regulate conflicts in the law of succession was, in fact, drafted at the Hague Conference in 1904 when the countries represented were Germany, Austria-Hungary, Belgium, Denmark, Spain, France, Italy, Holland, Portugal, Roumania, Russia, Switzerland, Sweden and Norway. By this draft convention, it was enacted that the estate of the deceased should be subject in regard to the transfer to heirs, the disponable quota, and representation,

whatever the nature of the property, or wherever situate, to the national law. It is noteworthy that the Conference was not attended by representatives of the leading States which adhere to the principle of domicile; hence it is not surprising that an amendment proposed by Professor Meili to the effect that the national law should ordinarily govern, but that the testator should have the right to designate the law of the domicile as applicable, was not accepted.

It was provided, in the second place, that immoveables should be subject to the same law as moveables, so that the universality of the succession should be completely secured.

Wills are declared good in matters of form, provided they satisfy the provisions either of the law of the place where they are made, or the law to which the deceased was subject at the moment when he made the will.

Several specific rules were made providing for respect for national laws, about the devolution and disposition of immoveable property, for the right of Consuls to administer the personal estates of their internals, etc. But it is not necessary to enter into the details of the draft convention. What is important to notice is the movement which it illustrates for setting up a definite international law to resolve conflicts, in place of the uncertain customary law which has subsisted for a century. Great Britain cannot long stand outside this movement; and it is to be hoped that when another Hague Conference is called to proceed with the drafting of a convention upon the subject of succession, her representatives will be present to secure the proper recognition of the principle of domicile, in accordance with her established tenets, while at the same time providing for an equitable arrangement, by which the successions of persons subject to a law which has another criterion for the personal statute may be adjudicated in the British Courts according to their national law.

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